TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1950

No. 363

32 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS., 3 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO, AND PURE FOOD MANUFACTURING COMPANY, CLAIMANT, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 16, 1950.

CERTIORARI GRANTED NOVEMBER 27, 1950.

United States Court of Appeals

TENTH CIRCUIT.

No. 4039.

UNITED STATES OF AMERICA, APPELLANT,

vs.

62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZS., SHIPPED BY THE PURE FOOD MANUFACTURING COMPANY, DENVER, COLORADO, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

FILED JANUARY 16, 1950.

INDEX.

Proceedings in the United States Court of Appeals.

Pleas and progeedings in the United States Court of Appeals for the Tenth Circuit, at the May Term, 1950, of said Court, before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

On the 16th day of January, A. D. 1950, a transcript of the record, pursuant to notice of appeal, filed in the United States District Court for the District of New Mexico, was filed in the office of the clerk of the United States Court of Appeals for the Tenth Circuit, in a certain cause wherein United States of America was appellant, and 62 Cases, more or less, each containing six jars of jam, assorted flavors, net wt. 5 lbs. 2 ozs., shipped by the Pure Food Manufacturing Company, Denver, Colorado, was appellee, which said transcript, as prepared and printed under the rules of the United States Court of Appeals for the Tenth Circuit, is in the words and figures following:

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 4039.

UNITED STATES OF AMERICA, APPELLANT,

vs.

SIXTY-TWO CASES, MORE OR LESS, CONTAINING SIX JARS OF JAM, etc., APPELLEE.

Statement of Points.

The United States of America, Appellant, makes the following statement of points to be relied upon.

(1) The District Court erred in not condemning the article under seizure as misbranded in interstate commerce within the meaning of Section 403 (g) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343 (g)).

(2) The District Court erred in concluding that the article under seizure did not purport to be and was not represented as fruit jam.

(3) The District Court erred in determining that the labeling of the article under seizure was the controlling factor in determining whether the article was misbranded under Section 403 (g) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343 (g)) inasmuch as labeling is only one of many factors to be taken into consideration under such section.

(4) The District Court erred in refusing to hold that the definitions of misbranding contained in Sections 403 (g) and 403 (c) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343 (g) and 21 U.S.C. 343 (c)) stand independent of each other, and in holding that, since the article under

seizure was labeled "imitation" under Section 403 (c), if was not misbranded under Section 403 (g).

UNITED STATES OF AMERICA, Appellant,
By: EVERETT M. GRANTHAM,
United States Attorney.
ALBERT H. CLANCY,
Assistant U. S. Attorney.

[Proof of Service attached to original.]

Filed United States Court of Appeals, Tenth Circuit, January 26, 1950. Robert B. Cartwright, Clerk.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO.

PLEAS AND PROCEEDINGS BEFORE THE HONORABLE CARL A. HATCH, UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW MEXICO, PRESIDING IN THE FOLLOWING ENTITLED CAUSE:

UNITED STATES OF AMERICA, LIBELLANT,

vs.

62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZS., SHIPPED BY THE PURE FOOD MANUFACTURING COMPANY, DENVER, COLORADO, LIBELLEE.

No. 1464.—Civil.

Libel of Information.

To the Honorable Colin Neblett, Judge of the United States District Court for the District of New Mexico.

1 Comes now the United States of America by Albert H. Clancy, Assistant U. S. Attorney for the District of New Mexico, and shows unto the Court:

I.

That this libel is filed by the United States of America in its own right and prays the seizure, for condemnation, of a certain article of food, as hereinafter set forth, in accordance with the Federal Food, Drugs and Cosmetic Act (21 U.S.C. 301 et seq.).

II.

2 That the Pure Food Manufacturing Company, Denver, Colorado, shipped in interstate commerce from Denver, Colorado, to Charles Ilfeld Company, Raton, N. M., via truck of Charles Ilfeld Company, on or about January, 1949, an article of food consisting of 62 Cases, more or less,

each containing six jars of jam, assorted flavors, the individual jars being labeled in part: "Net Wt. 5 lbs. 2 Oz. Delicious Brand Imitation Grape Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Strawberry Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Apricot Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Plum Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Peach Jam"; "Net Wt. 5 Lb. 2 Oz. Delicious Brand Imitation Blackberry Jam".

III.

The aforesaid articles are foods within the meaning of the Federal Food, Drug, and Cosmetic Act, and were misbranded when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce, within the meaning of said Act, 21 U.S.C. 343 (g) (1) in that they purport to be and are represented as fruit jams (graps, strawberry, apricot, plum, peach or blackberry), foods for which definitions and standards of identity have been prescribed by regulations promulgated pursuant to 21 U.S.C. 341 and they fail to conform to such definitions and standards since paragraph 29.0(a) of such definitions and standards specifies that fruit jams (grape, strawberry, apricot, plum, peach, or blackberry) are made from a mixture composed of not less than 45 parts by weight of the fruit ingredient (grape, strawberry, apricot, plum, peach, or blackberry) to each 55 parts by weight of one of the optional saccharine ingredients specified in such definitions and standards, and that such mixture is concentrated by heat to such point that the soluble solids content of the finished jam is not less than 68 per cent for grape, strawberry and blackberry, and not less than 65 per cent for apricot, peach and plum, as determined by the methods in such regulations prescribed, whereas, the articles were made from a mixture composed of less than 45 parts by weight of the fruit ingredient (grape, strawberry, apricot, plum, peach, or blackberry) to each 55 parts by weight of one of the optional saccharine ingredients specified in such definition and standard, and the soluble solids con-

tent of the articles (grape, strawberry, and blackberry) is less than 68 percent, and the soluble solids content of the articles (apricot, peach, and plum) is less than 65 percent, as determined by the methods prescribed in such definitions and standards.

IV.

That the aforesaid articles are in the possession of Charles Ilfeld Company at Raton, New Mexico, or elsewhere within the jurisdiction of this Court.

V.

That by reason of the foregoing the aforesaid articles are held illegally within the jurisdiction of this Court, and are liable to seizure and condemnation pursuant to the provisions of said Act, 21 U.S.C., 334.

Wherefore, Libellant prays that process in due form of law according to the course of this Court in cases of Admiralty jurisdiction issue against the aforesaid articles; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the condemnation of the aforesaid articles and grant libellant the costs of this proceeding against the claimant of the aforesaid articles; that the aforesaid articles be disposed of as this Court may direct, pursuant to the provisions of said act; and that said libellant have such other and further relief as to the Court may seem meet and proper.

ALBERT H. CLANCY,
Assistant U. S. Attorney.

4 United States of America, District of New Mexico, County of Santa Fe, ss:

Albert H. Clancy, of lawful age, being first duly sworn, on oath deposes and states that he is an Assistant U. S. Attorney for the District of New Mexico, and makes this affidavit for and on behalf of the United States of America, Libellant herein; that D. P. Willis, Assistant General Counsel, Federal Security Agency, Washington, D. C., re-

ported to this affiant the violation of the Act of Congress set up and described in the foregoing libel; that affiant has read the said libel and knows the contents thereof, and that the same is true to the best of his knowledge and belief and according to the information furnished him by the said D. P. Willis, of the Federal Security Agency.

ALBERT H. CLANCY,
Assistant U. S. Attorney.

Subscribed and Sworn to before me this 9th day of March, A. D., 1949.

FRANCES LUCERO,
Deputy Clerk, U. S. District Court, District
(Seal) of New Mexico.

Filed March 11, 1949.

Order.

5 This cause coming on to be heard this 11th day of March, 1949, upon the motion of the United States of America, by Albert H. Clancy, Assistant U. S. Attorney, for the District of New Mexico, praying that the usual process and monition of this Court do issue in this behalf.

Now, the Court being fully advised in the premises, doth grant the said motion.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the Clerk of this Court forthwith issue a warrant of seizure in due form of law, directed to the United States Marshal for the District of New Mexico, commanding him:

1st. To arrest all and singular the property effects described in said Libel of Information, and now stored with the Charles Ilfeld Company, at Raton, N. M.; that is to say, 62 Cases, more or less, each containing six jars of jam, assorted flavors, Net Wt. 5 Lbs. 2 Ozs., shipped by the Pure Food Manufacturing Company, Denver, Colorado, the

individual jars being labeled in part: "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Grape Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Strawberry Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Apricot Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Plum Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Peach Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Blackberry Jam".

2nd. To post a written notice on the bulletin board at the entrance to the U. S. Post Office at Raton, New Mexico, directing that all persons claiming the said property, or knowing or having anything to say why the same should not be seized and condemned, to appear, plead and show cause, if any they have, before this Court on or before the 11th day of April, 1949, why the said 62 Cases, more or less, each containing six jars of jam, assorted flavors, Net
6 Wt. 5 Lbs. 2 Ozs. shipped by the Pure Foods Manufacturing Company, Denver, Colorado, the individual jars being labeled in part: "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Grape Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Strawberry Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Apricot Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Plum Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Peach Jam"; "Net Wt. 5 Lbs. 2 Oz. Delicious Brand Imitation Blackberry Jam", should not be seized and condemned as prayed for in said libel, and that this matter be, and the same is hereby set down for hearing before this Court at Santa Fe, New Mexico, at ten o'clock a. m., on the 11th day of April, 1949.

3rd. To publish the said notice in the Raton Daily Range, a newspaper published daily at Raton, New Mexico, in two issues thereof, the last publication being not less than fourteen days before the 11th day of April, 1949.

4th. To serve a copy of said warrant of seizure on the Charles Ilfeld Company, at Raton, New Mexico.

Dated: Santa Fe, New Mexico, this 11th day of March, A. D. 1949.

COLIN NEBLETT,
United States District Judge.

Filed March 11, 1949.

Warrant of Seizure.

The President of the United States of America,

To the Marshal of the United States, for the District of New Mexico, Greeting:

Whereas, a libel of information has this day been filed in the above entitled proceeding, and the Court, upon consideration thereof, having entered its order directing that a warrant of seizure issue in due form of law, returnable at Santa Fe, New Mexico, in said District on April 11th, 1949;

Now, Therefore, You Are Hereby Commanded and Directed:

1. That you arrest and seize all and singular the property and effects described in said libel and now in the possession of Charles Ilfeld Company at Raton, New Mexico, to-wit: (62 cases, more or less, each containing six jars of jam, assorted flavors, net wt. 5 lbs. 2 ozs., shipped by the Pure Food Manufacturing Company, Denver, Colorado,)

2. That you post in writing on the bulletin board at the entrance of the U. S. Post Office at Raton, New Mexico, a notice directing the said claimant and all persons claiming the said described property, or knowing or having anything to say why the same should not be condemned and forfeited, to be and appear before this Court at Santa Fe, in said District, at 10:00 o'clock on the 11th day of April 1949, then and there to show cause, if any they have, why the said property should not be condemned and forfeited as prayed in said libel;

3. That you publish said notice in the Raton Daily Range, a daily newspaper published in Raton, in said District, in two consecutive issues thereof, the last publication to be not less than fourteen days before the said 11th day of April, 1949, and,

4. That you serve a copy of said warrant of seizure upon the said Charles Ilfeld Company at Raton, New Mexico, together with a copy of said libel.

8 And of your acts and doings hereunder that you make due return to this office, as the law directs.

Witness the Honorable Colin Neblett, Judge of the District Court of the United States for the District of New Mexico, assigned, and the seal thereof, at Santa Fe, in said District, this 11th day of March, 1949.

WM. D. BRYARS, Clerk,
By FRANCES L. LUCERO,
(Seal) Deputy Clerk.

Marshal's Return.

Received the within Warrant of Seizure, March 18, 1949 and on the 19th day of March, 1949, I executed same by seizing 23 Cases of the with.... named assorted jam etc., at the Charles Ilfeld Company warehouse in Raton, New Mexico, I did on the same day hand to Mr. Kenneth Kearney, Assistant Manager of said ware-house, a copy of the within Warrant of Seizure together with a copy of Order and Libel of Information attached, I also posted Notice of Libel on the bulletin board in the U. S. Post Office in Raton, New Mexico, on the same day I handed Notice of Libel for publication to the Editor of the Raton Daily Range, a daily newspaper, namely: James Barber, at Raton, New Mexico. The said 23 cases etc., of

assorted jams being left at the Charles Ilfeld Company warehouse until further order of the court.

FELIPE SANCHEZ Y BACA,
United States Marshal,
By J. FRANK TRUJILLO, Deputy.

Marshal's Fees

Service	$ 2.00
Expense	27.71
Total	$29.71

Filed March 23, 1949.

Motion for Removal to United States District Court for the District of Colorado.

9 Comes Now claimant, Pure Food Manufacturing Company, by its attorneys, Wilson & Whitehouse, Ireland and Ireland and Benjamin F. Stapleton, Jr., and states to this Honorable Court as follows:

There is pending in the United States District Court for the District of New Mexico a libel for condemnation proceedings under Section 334 of Chapter 21 of U.S.C.A. based upon alleged misbranding by the claimant Pure Food Manufacturing Company.

The number of libel for condemnation proceedings is limited to this action undertaken in the United States District Court for the District of New Mexico, and

All witnesses on behalf of the claimant are located in Denver, Colorado, and the goods seized by order of this Court were manufactured in Denver, Colorado, and claimant's principal place of business is in Denver, Colorado.

Now, Therefore, claimant, by its attorneys, moves this Honorable Court to remove this cause for trial to the United

States District Court for the District of Colorado, pursuant to Section 334 of Chapter 21 of U.S.C.A.

WILSON & WHITEHOUSE,
By JOSEPH G. WHITEHOUSE,
Albuquerque, New Mexico;
IRELAND AND IRELAND,
By BENJAMIN F. STAPLETON, JR.,
Attorneys for Pure Food Manufacturing Company, claimant.

Address of Claimant: 2420 Seventeenth Street, Denver, Colorado.

Filed April 18, 1949.

Order of Continuance.

This cause coming on to be heard this 18th day of April, 1949, and it appearing to the Court that the United States Attorney for the District of New Mexico, and Wilson & Whitehouse, Ireland & Ireland, and Benjamin F. Stapleton, Jr., attorneys for claimant, have failed to agree on the removal of this proceeding to the United States District Court for the District of Colorado, pursuant to Section 334 of Chapter 21 of U.S.C.A.;

It Is, Therefore, Ordered that the hearing scheduled for April 11, 1949 be continued to May 9, 1949, at which time the Court will hear oral arguments on the Motion for Removal of this libel proceeding to the United States District Court for the District of Colorado.

Dated at Albuquerque, New Mexico, this 18th day of April, 1949.

CARL A. HATCH,
United States District Judge.

Filed April 18, 1949.

Order Overruling Motion for Removal to United States District Court for District of Colorado.

This cause coming on to be heard this 12th day of May, 1949, upon the motion of claimant and Libellee, for removal to Denver, Colorado, plaintiff appearing by Albert H. Clancy, an assistant United States Attorney, the defendant appearing by Benjamin F. Stapleton, Jr., the Court having considered said motion, and having listened to arguments of counsel:

11 It Is Therefore Ordered, Adjudged and Decreed that said motion be and the same hereby is overruled.

CARL A. HATCH,
U. S. District Judge.

Filed May 12, 1949.

Answer of Pure Food Manufacturing Company.

Comes now Pure Food Manufacturing Company of Denver, Colorado, by its attorneys, Ireland and Ireland and Benjamin F. Stapleton, Jr. of Denver, Colorado, and Fred E. Wilson and Joseph G. Whitehouse of Albuquerque, New Mexico, and for answer to libellant's libel of information, answers and defends as follows:

First Defense.

The libel of information fails to state a claim against libellee and claimant upon which relief can be granted.

Second Defense.

Claimant admits the allegations contained in paragraph II of the libel of information; admits as alleged in paragraph III that the articles seized were "food" within the meaning of the Federal Food, Drug, and Cosmetic Act; that said articles were made from a mixture of less than 45 parts by weight of the fruit ingredient (grape, strawberry, apricot, plum, peach, or blackberry) to each 55 parts by weight of optional saccharine ingredients, and the soluble solids content

of the articles (grape, strawberry, and blackberry) is
12 less than 68 percent, and the soluble solids content of the articles (apricot, peach, and plum) is less than 65 percent; denies each and every other allegation contained in paragraph III of the libel of information; denies each and every allegation of paragraph V of the libel of information; alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the libel of information.

Third Defense.

Claimant has manufactured for a period of more than fifteen years imitation jams similar and in many instances identical to the articles seized under order of Court dated March 11, 1949; such "imitation jams" were manufactured by claimant in accordance with the provision of the Federal Food and Drug Acts of 1906 and 1938. The Congress of the United States ratified the manufacture and sale in Interstate Commerce of "imitation jams" and other "imitation" foods when it passed the Federal Food, Drug, and Cosmetic Act of 1938, which provided in part as follows:

"Section 343 Misbranded Food

A food shall be deemed to be misbranded—(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and immediately thereafter the name of the food imitated." Section 343 (c), Title 21, U.S.C.A.

That the Congress of the United States, in passing the Federal Food, Drug, and Cosmetic Act of 1938, and particularly Section 343 (c) of Title 21 of U.S.C.A., did not intend to prohibit the sale and shipment of imitation foods, all as exemplified by the Reports and Hearings of the 73rd, 74th, and 75th Congress and other documents and sources, is clear and unequivocal. Pursuant to the provision of Section 343 (c) of Title 21 of U.S.C.A., Congress specifically intended the manufacture and shipment in Interstate Commerce of imitation jams and other "imitation" foods such as the

13 articles seized in this proceeding; the imitation jams manufactured by the claimant and seized under order of this Court dated March 11, 1949 were manufactured, labeled, and shipped in Interstate Commerce in strict compliance with the Federal Food, Drug, and Cosmetic Act of 1938.

Wherefore, claimant having fully answered, prays that libellant's libel of information be held for naught, that the United States Marshal for the District of New Mexico be ordered and directed to release and return to the custody of the claimant all articles seized under the order of Court dated March 11, 1949, court costs and fees, and storage, and other expenses incurred as a result of this improper seizure to be paid by libellant.

IRELAND AND IRELAND,
BENJAMIN F. STAPLETON, JR.,
FRED E. WILSON, JGW,
JOSEPH G. WHITEHOUSE,
Attorneys for Claimant.

Address of Claimant: 2420 Seventeenth Street, Denver, Colorado.

Filed May 19, 1949.

Claimant's Requested Findings of Fact and Conclusions of Law.

47 This cause coming on to be heard this ..... day of August, 1949 before The Hon. Judge Carl A. Hatch, United States District Judge for the District of New Mexico at Albuquerque, New Mexico, and The Hon. Albert H. Clancy, Assistant United States Attorney for the District of New Mexico, and The Hon. Leonard Hardy of Washington, D. C., appearing on behalf of the United States of America, Libellant, and Ireland and Ireland and Benjamin F. Stapleton, Jr., of Denver, Colorado, and Fred E. Wilson and Joseph G. Whitehouse of Albuquerque, New Mexico, appearing on behalf of Pure Food Manufacturing Company, Claimant herein, and the Court having considered the sev-

eral stipulations made and entered into between counsel for the libellant and claimant, and also the arguments of counsel and the Court now being fully advised in the premises, the Court doth make the following Findings of Fact and Conclusions of Law:

Findings of Fact.

1. This action was filed by the United States of America for the seizure and condemnation of an article of food consisting of 62 cases, more or less, each containing six jars of an article of food, assorted flavors, the individual jars being severally labeled in part as follows: "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Grape Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Strawberry Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Apricot Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Plum Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Peach Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Blackberry Jam";

2. that the Pure Food Manufacturing Company of Denver, Colorado manufactured said articles of food and shipped the same in interstate commerce from Denver, Colorado, to Charles Ilfeld Company of Raton, New Mexico, by truck of Charles Ilfeld Company on or about January 15, 1949;

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3. that said articles were in the possession of Charles Ilfeld Company at Raton, New Mexico, which is within the jurisdiction of this Court, when seized by the U. S. Marshal for the District of New Mexico, pursuant to order issued March 11, 1949 in response to libel of information filed with the U. S. District Court at Albuquerque, New Mexico;

4. that said articles seized by the United States Marshal were "food" within the meaning of the Federal Food, Drug and Cosmetic Act of 1938;

5. that said articles seized have food value and are wholesome and are in every way fit for human consumption;

6. that the Federal Security Administrator has promulgated definitions and standards for fruit preserves and jellies, which definitions and standards of identity were published all as set forth in section 29 of Service Regulatory Announcements, Food, Drug and Cosmetic No. 2, Rev. 1, dated December 28, 1948;

7. that said Federal Security Administrator has not promulgated definitions and standards of identity for imitation fruit preserves and jellies;

8. that said claimant, Pure Food Manufacturing Company, has manufactured and marketed products similar to the articles seized, through the ordinary and usual channels of trade, for at least a period of fifteen years prior to the commencement of this action;

9. that the good faith of the Pure Food Manufacturing Company, claimant, in the manufacturing and marketing of products similar to the ones seized herein, is not challenged in this proceeding;

10. that said product in question was and is generally sold by wholesale dealers to retail markets and grocery stores and resold to the consuming public, and that to such purchasers the product bore the label identical with the label of the article seized;

11. that retailers advertise jams, preserves and jellies for sale and in filling telephone orders for same from housewives or other consumers, do frequently fill such orders with imitation jams and jellies similar to the product seized in this action and that such product bore the imitation label as hereinbefore set forth;

12. that the contents of the products seized are identical with that stated on the label with the possible qualification that the 20% pectin as stated on the label may more accurately be described as a 20% pectin solution;

13. that the imitation jams and jellies so manufactured by claimant, Pure Food Manufacturing Company, and simi-

lar to the items seized in this action, are sold to the consuming public substantially lower priced than the genuine fruit products, manufactured in accordance with standards fixed as aforesaid;

14. that a majority of the 5 lb. 2 oz. containers of imitation jam are sold and consumed by large families in lieu of butter or butter substitutes;

15. that the articles of food in question do not comply with the definition and standard of identity for fruit preserves and jams and do not purport and are not represented to so comply with such standards;

16. that the article of food seized purport to be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else;

17. that the articles of food seized are sold in interstate commerce without deception;

18. that products similar to those seized were sold to various wholesalers and retailers within the State of New Mexico, and that some of the same products were later resold to hotels, restaurants, ranches and logging camps within the State of New Mexico; that at least on one menu in a hotel in the State of New Mexico the menu carried the words "Jellies or preserves served with above orders"; that patrons of the hotel requesting such jellies or preserves were served a product similar and identical to the product seized in this proceeding, without disclosure by the hotel to patron that the article was an imitation jelly or preserve; and the patron had no opportunity of seeing or observing the label or knowing that he was eating and actually consuming an imitation product;

19. that some imitation jellies and preserves have been served by some ranches and logging camps and to employees thereof; and that such employees ate and consumed such products without being informed that the same were imitation products and without an opportunity to see or observe the label on the container.

Conclusions of Law.

1. The articles seized in the instant action are not misbranded under the Federal Food, Drug and Cosmetic Law of 1938.

2. The articles seized are imitations of pure food preserves and as such are sanctioned in interstate commerce under section 343C of Title 21 U.S.C.

3. The labels on the seized articles conform in all respects with the requirements of Section 343C, Title 21, U.S.C.

4. From the evidence adduced, the claimant is manufacturing and selling an article of food which is an imitation of a real article, namely fruit preserves and jellies, and purports to be nothing else.

5. The product seized does not purport to be nor is it represented as pure fruit preserves and jellies.

——————Insert #1, 2, 3 & 4

Since the articles seized are not misbranded, the Government's action therefore cannot be maintained, and the
51 articles of food seized under the decree or seizure dated March 11, 1949, must be restored to the claimant.

Done in Open Court this ..... day of August, 1949.

.....

United States District Judge.

Filed September 23, 1949.

Plaintiff's Requested Findings of Fact and Conclusions of Law.

Refused Except as otherwise given.

That the article of food involved in this case, and labeled in part "imitation jam", was so presented and represented to many consumers that to them it purported to be the food

"jam", for which definitions and standards of identity have been duly promulgated.

Refused.

That where consumers are supplied with a food that has the appearance and taste of, and is eaten for, a food for which there is a legal standard of identity, and such consumers have no opportunity to observe the label of the food consumed by them, such food purports to be to them the standardized food regardless of any declaration contained on the label as to the identity of the food consumed.

Refused.

That a food purports to be a food for which definitions and standards of identity have been established, where such food simulates the color, taste, and appearance of,
52 and is used in place of and in substitution for, such standardized food.

#1.

That the primary purpose of the Federal Food, Drug, and Cosmetic Act is to protect the consuming public, the ultimate consumer.

2.

That the Federal Food, Drug, and Cosmetic Act is not intended primarily to protect the ultimate purchaser as distinguished from the ultimate consumer.

3.

That the word "purport" as used in section 403 (g) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 343 (g)] should be construed to have its usual ordinary meaning.

4.

That where newspaper advertisements, menus in public eating places, and employers' private dining halls offer for sale or consumption a food which simulates a standardized food, without disclosing that such article is not the standard-

ized food, such simulating food is represented to the consuming public as the standardized food.

20.

That the article of food here involved has the appearance of grape jam, strawberry jam, blackberry jam, apricot jam, peach jam, and plum jam for which definitions and standards of identity have been established.

21.

That the food here involved is made to taste like and does taste like grape jam, strawberry jam, blackberry jam, apricot jam, peach jam, and plum jam for which definitions and standards of identity have been established.

22.

53 That the food which is the subject of this proceeding is used by the consumer in place of, and as a substitution for, the fruit jams grape, strawberry, blackberry, apricot, peach, and plum for which definitions and standards of identity have been established.

That the only manner in which consumers can readily distinguish the various "imitation" fruit jams under seizure from the standardized fruit jams is by reference to the label on the individual containers which states that the article is an "imitation jam".

Denied.

Filed September 23, 1949.

Court's Findings of Fact and Conclusions of Law.

This cause coming on to be heard this 9th day of August, 1949, before the Honorable Judge Carl A. Hatch, United States District Judge for the District of New Mexico at Albuquerque, New Mexico, and the Honorable Albert H. Clancy, Assistant United States Attorney for the District of New Mexico, and the Honorable Leonard Hardy of Wash-

ington, D. C., appearing on behalf of the United States of America, Libellant, and Ireland and Ireland and Benjamin F. Stapleton, Jr., of Denver, Colorado, and Fred E. Wilson and Joseph G. Whitehouse of Albuquerque, New Mexico, appearing on behalf of Pure Food Manufacturing Company, Claimant herein, and the Court having considered the several stipulations made and entered into between counsel for the libellant and claimant, and also the arguments of counsel and the Court now being fully advised in the premises, the Court doth make the following Findings of Fact and Conclusions of Law:

Findings of Fact.

54 1. This action was filed by the United States of America for the seizure and condemnation of an article of food consisting of 62 cases, more or less, each containing six jars of an article of food, assorted flavors, the individual jars being severally labeled in part as follows: "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Grape Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Strawberry Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Apricot Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Plum Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Peach Jam"; "Net wt. 5 lbs. 2 oz. Delicious Brand Imitation Blackberry Jam".

2. That the Pure Food Manufacturing Company of Denver, Colorado, manufactured said articles of food and shipped the same in interstate commerce from Denver, Colorado, to Charles Ilfeld Company of Raton, New Mexico, by truck of Charles Ilfeld Company on or about January 15, 1949.

3. That said articles were in the possession of Charles Ilfeld Company at Raton, New Mexico, which is within the jurisdiction of this Court, when seized by the U. S. Marshal for the District of New Mexico, pursuant to order issued March 11, 1949, in response to libel of information filed with the U. S. District Court at Albuquerque, New Mexico.

4. That said articles seized by the United States Marshal

were "food" within the meaning of the Federal Food, Drug and Cosmetic Act of 1938.

5. That said articles seized have food value and are wholesome and are in every way fit for human consumption.

6. That the Federal Security Administrator has promulgated definitions and standards for fruit preserves and jellies, which definitions and standards of identity were published all as set forth in section 29 of Service Regulatory Announcements, Food, Drug and Cosmetic No. 2, Rev. 1, dated December 28, 1948.

55 7. That said Federal Security Administrator has not promulgated definitions and standards of identity for imitation fruit preserves and jellies.

8. That said claimant, Pure Food Manufacturing Company, has manufactured and marketed products similar to the articles seized, through the ordinary and usual channels of trades, for at least a period of fifteen years prior to the commencement of this action.

9. That the good faith of the Pure Food Manufacturing Company, claimant, in the manufacturing and marketing of products similar to the ones seized herein, is not challenged in this proceeding.

10. That said product in question was and is generally sold by wholesale dealers to retail markets and grocery stores and resold to the consuming public, and that to such purchasers the product bore the label identical with the label of the article seized.

11. That retailers advertise jams, preserves and jellies for sale and in filling telephone orders for same from housewives or other consumers, do frequently fill such orders with imitations jams and jellies similar to the product seized in this action and that such product bore the imitation label as hereinbefore set forth.

12. That the contents of the products seized are identical with that stated on the label with the possible qualification

that the twenty per cent pectin as stated on the label may more accurately be described as a twenty per cent pectin solution.

56 13. That the imitation jams and jellies so manufactured by claimant, Pure Food Manufacturing Company, and similar to the items seized in this action, are sold to the consuming public substantially lower priced than the genuine fruit products, manufactured in accordance with standards fixed as aforesaid.

14. That a majority of the 5 lb. 2 oz. containers of imitation jam are sold and consumed by large families in lieu of butter or butter substitutes.

15. That the articles of food in question do not comply with the definition and standard of identity for fruit preserves and jams and do not purport and are not represented to so comply with such standards.

16. That the articles of food seized purport to be and are represented as imitation fruit presrves and purport to be nothing else and are represented as nothing else.

17. That the articles of food seized are sold in interstate commerce without deception.

18. That products similar to those seized were sold to various wholesalers and retailers within the State of New Mexico, and that some of the same products were later resold to hotels, restaurants, ranches and logging camps within the State of New Mexico; that at least on one menu in a hotel in the State of New Mexico the menu carried the words "Jellies or preserves served with above orders"; that patrons of the hotel requesting such jellies or preserves were served a product similar and identical to the product seized in this proceeding, without disclosure by the hotel to patron that the article was an imitation jelly or preserve; and the patron had no opportunity of seeing or observing the label or knowing that he was eating and actually consuming an imitation product.

57 19. That some imitation jellies and preserves have been served by some ranches and logging camps and to employees thereof; and that such employees ate and consumed such products without being informed that the same were imitation products and without an opportunity to see or observe the label on the container.

20. That the article of food here involved has the appearance of grape jam, strawberry jam, blackberry jam, apricot jam, peach jam, and plum jam for which definitions and standards of identity have been established.

21. That the food here involved is made to taste like and does taste like grape jam, strawberry jam, blackberry jam, apricot jam, peach jam, and plum jam for which definitions and standards of identity have been established.

22. That the food which is the subject of this proceeding is used by the consumer in place of, and as a substitution for, the fruit jams grape, strawberry, blackberry, apricot, peach, and plum for which definitions and standards of identity have been established.

Conclusions of Law.

1. The articles seized in the instant action are not misbranded under the Federal Food, Drug and Cosmetic Law of 1938.

2. The articles seized are imitations of pure food preserves and as such are sanctioned in interstate commerce under section 343 e of Title 21 U.S.C.

3. The labels on the seized articles conform in all respects with the requirements of Section 343 e, Title 21 U.S.C.

4. From the evidence adduced, the claimant is manufacturing and selling an article of food which is an imitation of a real article, namely, fruit reserves and jellies, and purports to be nothing else.

58 5. The product seized does not purport to be nor is it represented as pure fruit preserves and jellies.

6. That the primary purpose of the Federal Food, Drug, and Cosmetic Act is to protect the consuming public, the ultimate consumer.

7. That the Federal Food, Drug, and Cosmetic Act is not intended primarily to protect the ultimate purchaser as distinguished from the ultimate consumer.

8. That the word "purport" as used in Section 403 g of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 343 g) should be construed to have its usual ordinary meaning.

9. That where menus in public eating places, and employer's private dining halls offer for sale or consumption a food which simulates a standardized food, without disclosing that such article is not the standardized food, such simulated food is represented to such patrons, guests and employees, as the standardized food.

Since the articles seized are not misbranded, the government's action therefore cannot be maintained, and the articles of food seized under the decree of seizure dated March 11, 1949, must be restored to the claimant.

Done at Albuquerque, New Mexico, this 13th day of September, 1949, A. D.

CARL A. HATCH,
United States District Judge.

Filed September 14, 1949.

Opinion of the Court.

59 The facts in this case are not in serious dispute. Practically all the findings made are based upon the agreements of counsel.

Briefly, it may be stated that the article of food in question is an imitation jam. Jam is an article of food for which definitions and standards have been established.

The question involved is mainly one of law. The government asserts that an article of food for which definitions and standards have been established cannot lawfully be imitated and sold as an imitation of such article of food, even though such imitation is properly labeled as an imitation. The contentions of the government are based upon Section 343(g), Title 21 United States Code Annotated. This interpretation of sub-section (g) completely ignores sub-section (c). The statute reads in part as follows:

Section 343. Misbranded Food. A food shall be deemed to be misbranded . . . .

Imitation of Another Food.

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and immediately thereafter, the name of the food imitated.

It will be observed that sub-section (c) contains no exception of an article of food for which definitions and standards have been established. It plainly and clearly states an article to be misbranded "if it is an imitation of another food." The product in question is an imitation of another food. It does not pretend to be anything else. Sub-section (c) continues, "unless its label bears, in type of uniform size and prominence, the word 'imitation' and immediately thereafter, the name of the food imitated." Again, the article involved meets this as well as every other requirement of this sub-section. The language is unequivocal, without exceptions, and is not obscured in doubt or ambiguity, unless there is read into it language and meaning not now therein contained.

60 Any person reading sub-section (c) and even in connection with sub-section (g) would reasonably come to the conclusion that if the imitation of another food has a label bearing, in type of uniform size and prominence, the word "imitation" and immediately thereafter the name of the food imitated, such food so labeled would not be mis-

branded. Acting under such apparent, reasonable interpretation of the language of sub-section (c), the manufacturer has made and sold this article for years without any intent to violate the law. Claimant has sought to comply fully with every command of the statute. It is unnecessary to say that citizens have the right to rely upon the laws of the land as they are written and as reasonably interpreted. They should not be subjected to the hazards of administrative or judicial interpretation, extending restrictions of the law far beyond the plain meaning of the language used.

If the law-making branch of government desires this particular statute to be given the construction for which the government contends, it would be a simpler matter to insert in sub-section (c) an exception as to food for which definitions and standards have been established. No such appropriate language indicating the legislative intention to make it impossible to imitate an article of food for which definitions and standards have been established, appears in sub-section (c).

If sub-section (c) is to be amended to prevent imitation of an article of food for which definitions and standards have been established, the same should be done by legislative action in clear language easily read and understood by citizens, such as the claimant in this action, who seek only to know the mandates of the statute in order that they may comply with the same. Such an extension of language should never be made by administrative action or judicial construction.

61 Appropriate orders dismissing the libel and ordering the restoration of the articles seized may be prepared and entered.

CARL A. HATCH,
United States District Judge.

Filed September 14, 1949.

Judgment and Decree.

This Cause coming down to be heard this 9th day of August, 1949, before the Hon. Judge Carl A. Hatch, United States District Judge for the District of New Mexico at Albuquerque, New Mexico, and the Hon. Albert H. Clancy, Assistant United States Attorney for the District of New Mexico and the Hon. Leonard Hardy of Washington, D. C. appearing on behalf of the United States of America, Libellant, and Ireland and Ireland and Benjamin F. Stapleton, Jr., of Denver, Colorado, and Fred E. Wilson and Joseph G. Whitehouse of Albuquerque, New Mexico, appearing on behalf of Pure Food Manufacturing Company, claimant herein, and the Court having considered the evidence stipulated by libellant and claimant, the oral arguments of said parties, and the written brief filed on behalf of the Government, and the Court having made findings of fact and conclusions of law,

Now Therefore the Court being fully advised, it is Ordered, Adjudged, and Decreed, that the libel of information of the United States of America in this action, be, and the same hereby is, dismissed, and that judgment be granted in favor of claimant, Pure Food Manufacturing Company, and the United States Marshal is hereby ordered to immediately restore the seized articles to the Claimant Pure Foods Manufacturing Company of Denver, Colorado, and it is further,

62 Ordered, Adjudged, and Decreed, that the Court expressly retain jurisdiction to issue such further decrees and orders as may be necessary for the proper disposition of this proceeding.

Done in open Court this 20th day of October, 1949.

CARL A. HATCH,
United States District Judge.

Filed October 20, 1949.

Plaintiff's Notice of Appeal.

Notice Is Hereby Given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Tenth Circuit from the judgment and decree entered in this action on October 20, 1949.

EVERETT M. GRANTHAM,
United States Attorney.
ALBERT H. CLANCY,
Assistant U. S. Attorney.

Filed October 20, 1949.

Clerk's Docket Entry Re Mailing of Notice of Appeal.

63 October 20, 1949. Filing notice of Appeal on behalf of plaintiff.

October 20, 1949. Copies of Notice of Appeal mailed to Wilson & Whitehouse, Esquires, Attorneys at Law, 806 First National Bank Building, Albuquerque, New Mexico, and Ireland & Ireland, Esquires, and Benjamin F. Stapleton, Esquire, 802 Midland Savings Building, Denver, Colorado, attorneys for Claimant.

(Excerpt taken from Civil Docket No. 36, Page 248).

Order Staying Execution.

This cause coming on to be heard this 20th day of October, A. D., 1949, and the Court having on this date filed Judgment and Decree in said cause, and being advised that Notice of Appeal has been filed by the United States of America, it is therefore,

Ordered, Adjudged, and Decreed, that the execution herein be stayed until a final decision has been handed down on appeal.

Dated this 20th day of October, 1949.

CARL A. HATCH,
United States District Judge.

Filed October 20, 1949.

Order Extending Time for Docketing Appeal.

64 This matter coming on to be heard this 28th day of November 1949, upon the petition of an Assistant United States Attorney, praying for an extension of time within which to file the record on appeal, the Court having considered same, and being sufficiently advised in the premises:

It Is Hereby Ordered that the time for docketing the record on appeal in the United States Court of Appeals, Tenth Circuit, be and the same is hereby extended to ninety (90) days from and after October 20, 1949, the date on which the original notice of appeal was filed.

At Santa Fe, New Mexico, this 28th day of November, 1949.

CARL A. HATCH,
United States District Judge.

Filed November 28, 1949.

Pre-Trial Conference and Trial.

Before: Hon. Carl A. Hatch, Judge.

14 Albert H. Clancy, Assistant United States Attorney; Leonard Hardy, F. D. Clark, Pure Food and Drug Administration, attorneys for the government. Wilson & Whitehouse (By Mr. Wilson), Benjamin F. Stapleton, Jr., attorneys for the claimant.

The Court: I Suppose, Mr. Stapleton, you dictate for the record what you are willing to stipulate to and see if the government will agree to it.

15 Mr. Stapleton: We will stipulate that under—we will stipulate that the product seized is an imitation jam containing less than 45 per cent fruit base, and containing 55 per cent sugar, that it is sold in the 5 pound 2

ounce container, it is transported in interstate commerce, which we have admitted in our answer.

Mr. Clancy: Mr. Stapleton, may I ask you if you will go further and admit the labeling on it as it is?

Mr. Stapleton: We will admit the labeling on it.

Mr. Clancy: Will you admit that the United States Marshal seized this, and it is now in Raton, New Mexico?

Mr. Stapleton: We have no objection to that. We want to get down to the basic question in the case.

Mr. Clancy: The government itself will admit that this is a food.

The Court: Yes.

Mr. Stapleton: Well, is the government willing to admit that it is a wholesome food?

Mr. Clancy: Yes.

Mr. Stapleton: That it has food value.

Mr. Hardy: Well, I will put it this way, we are perfectly willing to admit it, but we object to its introduction, because it has nothing to do with the case. We are not charging it is adulterated and that it represents something it is not.

The Court: It is admitted it is a food and has food value. Whether it is material or not, you don't disagree with that?

16 Mr. Hardy: No, sir, the government is willing to admit that the label is such as it is. But for the truthfulness of the label the government is not willing to stipulate to that, which gets back to the first point raised by Mr. Stapleton in which he said they were willing to stipulate that it is an imitation jam. The government is willing to stipulate it is a jam that doesn't comply with the definition standards of identity, but not willing to stipulate it is an imitation jam.

The Court: There is a point of difference on what is jam and imitation jam.

Mr. Stapleton: That's right. . . . Now we are willing to stipulate that the 5 pound 2 ounce jar is intended for the ultimate consumer, and is in great quantity used by individual purchasers in place of butter and marjarine on the family dining table.

Mr. Hardy: I don't see that that fact is at issue. First, the government intends to prove exactly how the product has been used other than the way indicated by Mr. Stapleton, that is, by restaurants and eating places in which the ultimate consumer sees nothing but the jam put out on his plate and knows—and has no opportunity to see the label at all.

The Court: I believe you gentlemen can get down to your basic difficulties by agreeing that the article in question just labeled grape jam doesn't comply with the standard prescribed for grape jam.

17 Mr. Stapleton: That's right. I agree to that.

Mr. Hardy: Go one step further, Your Honor. The seizure involved six different kinds of jam.

The Court: The same agreement will be made as to all the articles taken under this seizure.

Mr. Stapleton: Yes, it being understood we contend this is not grape jam at all.

The Court: I understand. That is agreed. That these articles seized do not comply with the standards set up for the article itself in its true form of grape jam or whatever it might be. It is your contention that it is an imitation jam, and that it does comply with the standard in that regard.

Mr. Stapleton: Yes, sir.

The Court: Well, there isn't so much difference between you gentlemen as I see it. The next question is whether

you can manufacture an article like this and call it when a standard is prescribed for the real article.

Mr. Stapleton: That is basically the issue as I understand it.

Mr. Hardy: That's right, of course, understanding that it is the government's position that an imitation of a standardized article necessarily purports to be and represents the standardized article, and therefore is an illegal article of commerce.

18 The Court: In other words that you cannot make something for which standards are prescribed and call it imitation. It must comply with the standards.

Mr. Hardy: That is correct, Your Honor.

The Court: Of course, to that you disagree.

Mr. Stapleton: Yes, sir.

The Court: That is the point of disagreement. Can we dispose of the case on that legal question?

Mr. Stapleton: We would be very willing to. That is the basic question, and we stand to win or lose on that specific question.

The Court: It would simplify the issues greatly if that is the government's position, and that is the question you want determined.

Mr. Hardy: That is the ultimate question. Of course, it seems to me in order to bring that legal question in for consideration there must be stipulated for the purpose of the legal argument that the jam purports to be and is represented as jam, for which a standard of identity has been established.

The Court: Are you willing to agree, Mr. Stapleton, that this article is so served in hotels and restaurants and logging camps and the places Mr. Hardy has mentioned, without conceding the legal effect of that? But as a fact, is it not so?

Mr. Stapleton: I will say this, Judge, we can't say that they have been deceived or misled in any respect in the matter.

The Court: I am trying to get the facts to see what we can eliminate for the purpose of disposing of this as a legal question. Are you willing to agree that this article is served in those places as indicated by the government and as the real genuine jam and not an imitation?

Mr. Stapleton: No, that is beyond our knowledge. As I see it, we have no knowledge whatsoever that it is being served that way.

The Court: That is the essential part of the government's case as I take it.

Mr. Hardy: Yes, Your Honor, it is.

(Further discussion.)

Mr. Stapleton: Your Honor, we are willing to stipulate this was sold to restaurants and hotel managers and foremen of logging camps, but we can't go any further than that and say there is any deception there. If that would be any help in the case, we will go that far.

Mr. Hardy: Will you go further and say that the hotel managers and logging camp operators and ranch operators sold the same to their patrons and employees without disclosing to them the label on the article and without disclosing to them this is or is not a pure jam?

Mr. Stapleton: No, that is our case again.

The Court: I believe as a matter of fact that you could stipulate to that, Mr. Stapleton. They don't disclose to their patrons that this is labeled imitation jam, and they don't disclose it to their employees out on a ranch or logging camp that this article is labeled imitation and that is what we are feeding you. I just can't conceive of them doing that.

20 Mr. Stapleton: I am trying to say that shouldn't be an issue in the case.

The Court: As a legal point you could—well, I guess it would not be admissible as evidence or has no material effect on the legal point—but, as a matter of fact, as I stated a while ago, without conceding any legal effect and maintaining that it is inadmissible as evidence and the court should not consider it in determining the legal point, I think you could well stipulate as to that fact.

Mr. Stapleton: Well, now let's see if we can't get a stipulation on that. We would stipulate that in logging camps, restaurants and other public eating places that this jam that has been seized in this case will be served to patrons without disclosing the label on the jars. Does that cover the situation?

Mr. Hardy: That would cover the situation in logging camps and on ranches and in most eating places with the one exception of the case that—one example which the government has where they do print on the menus that jams and jellies are served with the above meals. To that extent the government contends there isn't any jam or jelly, and when the proprietor puts that on his menus, he must necessarily mean pure jams and jellies are served.

21 The Court: I think that point can be met if you gentlemen will agree to go just a little further in your stipulation and say that it is served as jam without disclosing the contents or label and that it is imitation jam.

Mr. Stapleton: That is all right, it being understood we can object to the admissibility of such evidence.

The Court: That is understood. And offer to the Court anything it may consider in passing upon the legal point, that you think it isn't material and has no legal effect whatever in this case.

Mr. Hardy: Now, Your Honor, it is a legal question.

The Court: It looks to me like you have gotten down to a legal question.

Mr. Hardy: If so, couldn't you settle that right at this pretrial conference. If you rule that is inadmissible, the government has no case.

The Court: Are you gentlemen willing to proceed at this time to discuss the admissibility of that evidence and have the Court rule on it at this pre-trial conference?

Mr. Hardy: We are ready.

The Court: I will be glad to hear you on that. We will take a recess for five minutes before we start.

(Recess.)

22 Mr. Clancy: In the event the Court should hold that the government's evidence is inadmissible, would we be precluded from taking an appeal? In order to get the record in such shape that an appeal could be taken if the government decides it is their intention to appeal, will opposing counsel stipulate that for the purposes of appeal no question will be raised on the fact that this was at the pre-trial conference?

The Court: Well, now let me interrupt there just a minute, Mr. Clancy, I was thinking about that situation. I judge that whatever way the Court decides this point the case will be appealed, and the record should be made in a proper way so that there will be no question as to the rights of either party. I suggest now that we abandon the pre-trial conference that I set this case for immediate hearing as a non-jury trial, and that you make your statement of facts dispensing with evidence. Counsel can agree to those facts. Then to get down to the question of your proof on this particular point. You make your offer of proof as you would at a trial. Counsel can make their objections, and the Court will rule on it, just as it would at a trial. In fact, this will be at a hearing.

Mr. Stapleton: I have no objection to that. You bring up the question as to whether at a pre-trial conference the question of admissibility of evidence is raised?

Mr. Hardy: No, my point is that should the Court hold against us could the government—

23 The Court: I think my suggestion would be better and would obviate any question at all.

Mr. Stapleton: That is right. We will only argue the part as to the admissibility of the evidence at this time and move a continue—if it is admitted in evidence, we will continue the case to hear the full evidence on that point?

The Court: No, right now, let's have the trial, the entire case, the legal argument on the entire case. I assume you gentlemen are ready?

Mr. Stapleton: We are ready on the legal argument, but there are other questions of fact.

The Court: Suppose the Court should rule against you and say the Court would admit it, would you then want to have the privilege of offering contradictory testimony?

Mr. Stapleton: Yes, sir, I would, and I would also like to argue. . . . (Further discussion between Court and counsel.)

The Court: Well, let's proceed now on a regular hearing, and we will go as far as we can go, and then if it develops that additional testimony is needed from either or both sides, the cause will be continued until some time when that evidence will be available. Now at this time, by agreement of counsel, the pre-trial conference is discontinued. The case is set for immediate hearing before the Court, and the parties will proceed with the introduction of such testimony, and the making of such argument, and such offers of proof as they desire. Now the government has

24 the burden of proof, and I suggest that you state briefly the facts which have been heretofore agreed upon, and when you have finished let Mr. Stapleton then

say whether or not he agrees. This is a brand new record we are starting on now.

Mr. Hardy: It is the government's understanding that it is agreed between counsel for both sides that the article under seizure was shipped in interstate commerce, that it is food within the meaning of the Pure Food, Drug and Cosmetic Act, and the article has been seized by the United States Marshal, and is now in his possession, that the article is labeled as set forth in the libel filed by the government, that there is definition and standard of identity duly promulgated by the Secretary of Agriculture, establishing definitions and standards for jams and preserves, that the article under consideration does not comply with the definition and standard of identity so promulgated.

(Off the record discussion.)

That the articles under seizure or exactly similar articles have sold to restaurants, eating places, ranches, and logging camps, and that the contents have been fed to consumers and employees without disclosing the label on the container and without advising the consumer whether or not the article was a pure or imitation jam.

Mr. Stapleton: I didn't go to that last clause.

The Court: I think that is an addition. The words used were "without disclosing." That is what you agreed to. You have ordered without advising. I don't know that there is any difference.

Mr. Hardy: Shall we stop with the stipulation without disclosing?

Mr. Stapleton: Yes.

The Court: Of course, that agreement is made subject to the legal objection that the proof will not be admissible in evidence.

Mr. Hardy That's right.

Mr. Stapleton: That's right.

The Court: I believe you have sufficiently covered the facts down to that point. I will hear you now on whether that evidence is admissible.

(Argument of counsel.)

Mr. Stapleton: I wonder if those words could be without disclosing it was an imitation jam.

The Court: It amounts to the same thing.

Mr. Stapleton: I want the record to show that the article itself was labeled imitation.

The Court: I think you might go further, unless the record may be in error about this, and indicate that this article was consumed solely by patrons of hotels, restaurants, and logging camps, and ranches, and that it is also an article sold to the public generally and is used by housewives and others purchasing it. In other words, you are not confining it just to the ranches and hotels and logging camps.

26 Mr. Hardy: Of course, the government wouldn't attempt to prove that, Your Honor. Our position is that it doesn't make any difference whether they see the label or not in the last analysis.

The Court: From what has been said, if it is material the Court will consider that it is generally used.

Mr. Hardy: All right.

Mr. Stapleton: I wonder if I could add one more thing. There is no disclosure by the ultimate purchaser. I think that is important in the line of the poppy seed case. You are saying there is no disclosure by the ultimate purchaser, and I think that should be inserted in our agreement.

Mr. Hardy: I think the man that has to digest the food is the one we are interested in.

The Court: The point is that there is no disclosure by the purchaser, the hotel to the man that eats the food.

Mr. Hardy: The ultimate consumer has no knowledge of the label on the object under seizure.

Mr. Stapleton: That's right.

The Court: All right.

Mr. Stapleton: I will try to be as brief as I can and still cover the situation.

(Argument of counsel.)

27 The Court: Now, my mind has been going through something else. I am still trying to dispose of this case today. Will you further state for the purpose of the record, Mr. Hardy, what your witnesses would testify, not whether it is true or not or as to the legal effect, but what would be the testimony of your witnesses if they were produced in Court, can you state that or do you want a little time to think about it? My thought is that if after you make your statement as to what these witnesses would testify if present, then counsel for the other side might agree that they would so testify, and the Court could consider it as the testimony of such witnesses, if the Court decides the evidence is admissible. And then in the same way you could state, Mr. Stapleton, what your witnesses would testify if present without binding the government as to the truth of the witnesses' testimony. And in that way make a record upon which this case could be decided without bringing the witnesses here in person.

Mr. Hardy: Any statement I would make, Your Honor, I wouldn't want to be wholly bound by it because our case hasn't been completely developed at this stage but has been developed far enough to tell what witnesses we have and what they will testify to. There are other witnesses which we have fined up and which we can't state what they will testify to at the present time. We have learned some unusual facts on this pleasant visit to your fair city.

28 The Court: Would the facts that you could state that your witnesses can testify to, would they be sufficient for the Court to base a decision on, or are these other witnesses essential to your case?

Mr. Hardy: It is a very difficult question, Your Honor. I think I will have to leave it to your judgment.

The Court: I am not particular about saving the Court's time any more than counsel. You have come a long way, and if we could reach some kind of record that would prevent bringing these witnesses here, it would help all of us.

Mr. Hardy: I would have to leave it to your judgment to state whether the evidence we have now would be sufficient to sustain our case.

The Court: I think it is sufficient to sustain your point that you are raising. At this time, I don't want to say that it would be sufficient to sustain your case.

Mr. Hardy: Then, we are just looking to the point I am putting.

The Court: Yes.

Mr. Hardy: The first witness we will put on will be an inspector of the Pure Food and Drug Administration who will testify that he visited the dining room of a certain hotel. May I give the name of the hotel?

The Court You can if you desire. I think it would be better. Do you require the name of the hotel, Mr. Stapleton?

29 Mr. Stapleton: It isn't material to me.

The Court: All right. You need not give it.

Mr. Hardy: If we don't go to trial, I would rather it not be in the record.

The Court: You are at trial now.

Mr. Hardy: All right. The Yucca at Raton, New Mexico. That he ate a meal in the Yucca Hotel and read the menu, and the menu had printed on it "jellies or preserves served with the above orders."

The Court: Jellies or preserves?

Mr. Hardy: Served with the above orders. He visited the kitchen of the Yucca and asked to see the preserves and jellies they were serving in response to their customers' rquest for jellies or preserves as set out on the menu, and he was shown a number of jars of the article under seizure. He asked the hotel proprietor, did he serve these in response to customers' request for jellies, and he said he did. Jellies and preserves. The witness would testify that he asked the hotel proprietor did he advise his patrons that the jams and preserves were imitation, and he said he did not. We would introduce the proprietor of the Yucca Hotel who would testify—strike that please. We would put in evidence as a government exhibit a copy of the menu of the Yucca Hotel. I would have this identified by the proprietor of the hotel as being a menu of his hotel. The proprietor of the Yucca Hotel would testify that in response to the statement printed on his menu and the request of his patrons jellies and jams he served them, the imitation branded jam, which we are here considering. The Pure Food and Drug Inspector who ate it at this Yucca Hotel would testify that he asked the proprietor of the hotel whom he purchased the jam from and was advised whom he purchased it from, that he visited the wholesale house from which the hotel proprietor purchased the jam, and there observed the actual jam which is under seizure. The wholesale house advised him, advised the inspector, that he purchased the jam from the Pure Food Manufacturing Company of Denver, Colorado. The witness would testify, the inspector, that he notified the United States Marshal, and the libel was duly filed and parent lot in the wholesale house was seized and is the subject of this trial. There would be proprietors from eight or nine restaurants testifying to the effect that they served imitation Delicious Brand jams of one type or another to their patrons when their patrons asked for jams and jellies. In these cases, there would be no introduction of menus, because the menus did not bear the mention that jams or jellies would be served with the orders, but the proprietors would testify

that when they were requested to serve jams and jellies that they served the imitation product. We will have a witness—

31 The Court: Those witnesses did not disclose to their patrons that it was—

Mr. Hardy: These witnesses would all testify that their patrons had no way of learning, and did not in fact learn, that the jams they were eating were the Delicious Brand imitation jams. We would have witnesses from grocery stores who would testify as their ads certain ads in newspapers in which it was stated—in which advertisements were made for, say, strawberry jam or a plum jam or pure preserves, that they were in fact advertising Delicious Brand imitation jams, that in response to telephone orders from housewives asking that they be sent some of the preserves and the jams advertised, that they filled these orders by sending the jams and preserves. We would have—

The Court: Now, but what jams and preserves?

Mr. Hardy: The jams and preserves of the type under seizure, Your Honor, in response to telephone orders. We would have, I can't say how many, Your Honor, but witnesses who purchased for one or more logging camps, and persons who purchased for one or more ranches, and persons who purchased for chuck wagons, for sheep ranches, who will testify that they buy the article under seizure or the type of article under seizure, the Delicious Brand imitation jam in the 5 pound 2 ounce container and served this to the employees of the Chuck Wagons and ranch dining rooms as jam and in no way disclosed to the employees that they are in fact imitation jams rather than pure jams. That is the extent of our case at the present time, Your Honor.

32 The Court: Now, Mr. Stapleton, without waiving your objection to the admissibility of this evidence, would you be willing to agree now that these witnesses named by the government and indicated as to their testimony by Mr. Hardy would so testify if they were present, and that

the Court might consider such testimony without actually bringing the witnesses here?

Mr. Stapleton: There is no objection to that.

The Court: Then, that is so agreed. Now, Mr. Stapleton, still reserving all your rights as to the admissibility of any of this testimony, are you prepared to state what witnesses you would produce and what they would testify to, if present.

Mr. Stapleton: May we have just a moment.

The Court: Yes, I realize I am just trying to wind up this case quickly.

(Recess.)

The Court: Mr. Stapleton, are you ready to state what your witnesses would testify?

Mr. Stapleton: We would first put on Mr. H. C. Fishback, the president and general manager of the Pure Food Manufacturing Company of Denver. He would state that he manufacturers the articles seized in this proceeding, that they were manufactured under pure and sanitary conditions,
33 that the product manufactured and seized in the instant case was wholesome and had food value, that the label imitation strawberry jam and other jams, as seized in this case, were truthful labels and set forth the quantities of the respective ingredients of the imitation jams, that these jams, imitation jams, had been manufactured by the Pure Food Manufacturing Company for a period in excess of fifteen years prior to the instant seizure, and that prior to that time the company had manufactured what was known as a compound jam which was in effecet the same type and consistency of jam now being produced, but at the request of the Federal Food and Drug Administration in Denver, Colorado, this label was changed to imitation jam, that these goods are sold to wholesalers in Montana, Wyoming, Nebraska, Colorado, part of Kansas, and New Mexico, and that a majority of the five pound two ounce jars are imitation jam, such as were seized in the instant case, are mar-

keted through retail food stores to ultimate consumers, that the articles are marketed through retail food stores are displayed prominently with the label as on the articles seized, and that in the majority instances, the price of the imitation jam is 50 per cent lower than the pure fruit jams and preserves which are in accord with the definition and standard of identity for pure fruit preserves, that the company maintains in the New Mexico trading area a salesman employed by the claimant who devotes his exclusive time to
the sale of five pound two ounce jars to retail food
34 stores for purchase thereby the ultimate purchaser, that the claimant does not make any concentrated effort to sell this product to hotels, restaurants, logging camps, ranches, and other similar institutions, but that the wholesaler in his discretion may sell to such types of outlets. Mr. Fishback would also testify that he has many instances where the consumer writes into the company stating that they prefer the imitation jam to the pure fruit jam, and in many instances the claimant company receives correspondence from outside the trading area asking where such imitation jams may be obtained. There will also be witnesses who are consumers who have purchased this product at retail in the New Mexico trading area who will testify that they purchased the product as imitation jams, realizing that there was a deviation in the price of over 50 per cent between the pure fruit jams and preserves and the articles similar to those seized in this proceeding, that these consumers will further testify that they bought the seized product in five pound two ounce containers for use on the family table in lieu of butter or oleomargarine which are more expensive food products. Further, we would have a witness who would identify imitation jams and jellies are a food separate and apart from pure fruit jams and jellies and are so known in the trade. Now, this witness would refer to the United States Department of Commerce pamphlet entitled Domestic Commerce, Volume 35, issue No. 5,
of May, 1947, in which the Department of Commerce
35 is summarizing the jelly and jam industry in the United States and which states as follows: At page

62 of Volume 35, Issue No. 5, "Imitation jellies account for a very small percentage of the total jelly production, and the trade states that they are gradually going off the market. They consist entirely—they consist partly or entirely of pectin solution or apple pulp extracts and sugar for materials and artificial coloring. These imitation jellies must be labeled 'imitation fruit jellies.' They are generally sold at lower prices than the pure jellies." This witness would further testify that the trade journals or the National Preservers Association have in the last year constantly stressed the need for forcing the imitation jam and jelly manufacturers off the market, and that Mr. Forbes, the general counsel for that association, has been leading the drive for a determination of this issue in favor of the pure fruit jam manufacturers. Mr. Fishback will also produce the books to show what percentage of his volume of manufactured imitation jams and jellies are sold directly to the retail food stores from the wholesale distributors of the product, and that that distribution will show in excess of 50 per cent going to the retail food outlets. That, Your Honor, would be the case of the plaintiff if allowed to present it.

The Court: What do you say, Mr. Attorney, you and Mr. Clancy? Are you willing to agree that these witnesses would testify to the facts which have been detailed by Mr. Stapleton? Subject to the exception as to the competency and materiality and relevancy of such testimony?

36 Mr. Hardy. Of course, there would be violent objections to certain portions of that, particularly with reference to opinion testimony as distinguished from factual testimony.

The Court: You refer to the testimony concerning what Mr. Fishback—

Mr. Hardy: Mr. Fishback, particularly, and we think what Mr. Forbes thinks is without materiality. Mr. Fishback's opinion as to whether this goes to one type of group or another is pure opinion evidence, and we would object to that.

The Court: Subject to those objections and any other objections on the grounds of admissibility, would you agree, if admitted, these witnesses would so testify?

Mr. Hardy: I see no reason why the claimant would not be able to procure witnesses who would testify as he has indicated.

The Court: Upon the agreements, gentlemen, which you have made, are you now willing, subject again to the admissibility of the testimony, for the Court to consider this evidence which you have both related the witnesses would testify to as evidence and make its findings of fact upon the statements as made?

37 Mr. Hardy: The government would like to add just a little to its case, which we haven't developed now but feel sure we would. We have no doubt that we would be able to present to the Court witnesses from logging camps and ranches in the form of employees who have actually eaten this jam and who had—who would testify that they thought it to be jam, believed it to be pure jam, and had no way of determining that it was other than pure jam.

The Court: And did not know it was an imitation product?

Mr. Hardy: That is correct, Your Honor.

The Court: Would you agree, Mr. Stapleton, that these employees of the logging camps and ranches would testify that they actually ate the jam without any knowledge that it was not a genuine product.

Mr. Stapleton: That was if they did not have the opportunity to see the label on the product.

The Court: You will agree that they will so testify.

Mr. Stapleton: If they did not have an opportunity to see the label on the product. I doubt whether they did.

The Court: You can prove that in your statement. They would testify that they had not seen the label on the product;

Mr. Attorney? You will include that as part of the evidence these men would give that they had not seen and had no knowledge of the label on the product?

Mr. Hardy: Yes, sir.

38 Mr. Stapleton: May I ask a question there? Actually what we are doing is saying that these people would come up and say they didn't have the opportunity to look at the label, and that they ate it and couldn't determine it was fruit jam—

The Court: Even further than that. They would testify, according to Mr. Hardy, that they thought it was the genuine article.

Mr. Stapleton: I think that is all right. We have no objection.

The Court: All right, that will be so considered then. Do you have anything further, Mr. Hardy?

Mr. Stapleton: We would be very happy to admit that last.

The Court: You might get out some advertising on that.

Mr. Hardy: Before the Court made a determination in findings of fact and conclusions of law, the government would like to file with the Court and with the claimant's attorney a trial brief, which has been carefully prepared and which we believe should be considered primarily on legal questions. Of course, if the case is decided by Your Honor solely on the factual issues, the brief would have no application.

The Court: I think you are getting it in shape so that the Court can really decide it as a matter of law. There isn't any dispute as to the facts, I don't believe.

(Further discussion between Court and counsel.)

The Court: At this time, under the agreement of counsel, the Court is going to admit the testimony which has been

detailed by the government and also the testimony
39 which has been related by the claimant, subject to the admissibility of such evidence in arriving at a decision in this case, the Court being mindful that it is a trial without a jury and will try to exclude from consideration any and all incompetent testimony. In that regard, the Court will say that is considers the testimony as to what this commerce quarterly said and as to the motives of Mr. Forbes as being highly incompetent, and the Court will not consider those in reaching a decision. With that statement, the Court will proceed to make its findings of fact. It will state that the findings of fact are based on the agreements which have been made before counsel related what witnesses would testify and also including the testimony to which the parties have agreed the witnesses would testify, and which the Court might consider in reaching its decision.

The Court finds as a fact that this action was filed by the United States for the seizure and condemnation of certain articles of food under the federal Pure Food, Drug and Cosmetic Act; that the Pure Food Manufacturing Co. of Denver, Colorado shipped in interstate commerce from Denver, Colorado to Charles Ilfeld Co. in Raton, New Mexico, by truck of the Charles Ilfeld Co., on or about January 19, 1949—I am reading these statements from the complaint.

Mr. Stapleton: We admit all that to be true.

The Court: Paragraph 2, you admit all of that?

Mr. Stapleton: Yes, sir. On or about January 19, 1949, an article of food consisting of 62 cases, more or less, each containing 6 jars of jam, assorted flavors, individual jams being labeled in part . . .

40 (Off the record discussion.)

The Court: As follows—and just quote the label.

Mr. Hardy: Yes, sir, that would be an exhibit.

The Court: Yes. That said articles were in the possession of Charles Ilfeld Co. at Raton, New Mexico, within the

jurisdiction of this court. The Court further finds as a fact that the articles in question were sold to various wholesalers, retailers, within the State of New Mexico, and that some of the same was later resold to hotels, restaurants, ranches, logging camps, within the State of New Mexico. That on at least one of the menus of a hotel in the State of New Mexico the menu carried the words "jellies or preserves served with the above orders," and patrons of the hotel requesting such jellies or preserves were served the product involved in this proceeding without disclosure by the hotel to the patron that the article was the imitation jelly or preserve, and that the patron had no opportunity of seeing or observing the label or knowing he was eating and actually consuming an imitation product; that the same is true of jellies and preserves served by some ranches, logging camps, to employees thereof; that such employees ate and consumed such product without having disclosed to them the fact that it wasn't
41 the genuine article but was an imitation, and they had no opportunity of seeing or observing the label on the same.

The Court further finds as a fact that the product in question was generally sold by retail dealers to the public, housewives and others, and that to such purchasers the product bore the label as hereinbefore set forth.

The Court further finds as a fact that retailers advertised preserves and jellies for sale, and that in filling telephone orders for the same from housewives or other purchasers they frequently filled such orders with the product in question.

Am I overlooking any facts that should be found, gentlemen?

Mr. Stapleton: How about the manufacture and . . .

The Court: The Court further finds that the product in question is of food value and is wholesome and in every way fit for human consumption.

Mr. Hardy: Doesn't the Court think it should make a

finding that there are standards of identity established for preserves and jams and this doesn't comply with them.

The Court: The Court further finds that the Pure Food and Drug Administration has established definitions and standards of identity for jams, jellies, and preserves; that the article in question doesn't comply with such standards, and doesn't purport to so comply.

42 Mr. Hardy: Can we have a finding that this is a matter of fact imitation strawberry jam?

(Off the record discussion.)

The Court: The Court finds and determines the product in question to be as composed and manufactured and set forth in the label. Whether it is an imitation or not will be a matter of argument. The actual thing itself is the finding of fact. That meets your . . . ?

Mr. Hardy: We don't think it is a legal argument so much as a factual one.

The Court: I have made the finding that the article is as set forth in the label.

(Off the record discussion.)

The Court: The finding of fact as to the contents of the product being identical with that as stated on the label is subject to the possible qualification that the twenty per cent pectin, as stated on the label, would probably be a twenty per cent pectin solution. Is that correct?

Mr. Stapleton: Yes, sir.

Mr. Hardy: Yes, sir.

The Court: That covers it?

Mr. Hardy: That is all we ask, Your Honor.

The Court: Is there any other fact which should be found to present the issue squarely? What I am trying to do is to get a record in which the Supreme Court will have all the record.

43 The Court further finds as a fact that the price of the product in question is substantially lower than the genuine fruit product, of which it is alleged it is an imitation.

Mr. Stapleton: We would like also, Your Honor, to have a finding that this product has been manufactured for a period of fifteen years, and was changed at the request . . .

The Court: I don't see, especially see, the materiality of that. But it isn't disputed, I don't think.

Mr. Hardy: Your Honor, we have searched our files deliberately and we can find no correspondence with the Pure Food Manufacturing Co. to the effect that they should change their label from compound jam to imitation jam. We have been informed by the attorney of the claimant that there was such correspondence . . .

Mr. Stapleton: No . . .

Mr. Hardy: You implied that they had done that.

Mr. Stapleton: That's right.

Mr. Hardy: So we made a very diligent search.

The Court: The only point in that testimony is that it would effect, probably, the good faith of the claimant in this case, and there is nothing here that challenges the good faith of the manufacturer.

Mr. Hardy: No, sir, we are not challenging that.

44 The Court: The Court will find as a fact that the product has been manufactured and marketed through ordinary and usual channels of trade throughout the territory described for at least the period of fifteen years. Do you think of any other facts that should be found, Mr. Hardy?

(Off the record discussion.)

The Court: The Court further finds that no standard has

been set up, or definition, for a product labeled imitation such as is involved in this case.

(Off the record discussion.)

Mr. Clancy: If the Court please, I am prepared at this time to file a brief and give Mr. Stapleton a copy.

The Court: All right. We will recess until 1:30.

(Noon recess.)

The Court: Did you gentlemen think of any other findings of fact that should be made?

Mr. Stapleton: We discussed it at the noon hour and we think the findings of fact are sufficient.

The Court: What do you think, Mr. Hardy and Mr. Clancy?

Mr. Hardy: No amendments to suggest, Your Honor.

The Court: Do the findings of fact the Court made show the size of the jars in which this was contained? I don't know whether it is material or not. By the Court looking at this, it is 5 lbs. and 2 oz.

Court Reporter: It is in the finding in which you describe the label.

45 The Court: All right. Mr. Stapleton, we will hear you now.

(Argument by Mr. Stapleton.)

The Court: Mr. Hardy, you gentlemen have filed a brief. Do you have anything you want to say in addition to what you say in the brief?

Mr. Hardy: You prefer, Your Honor, that I not repeat anything in the brief?

The Court: If this fully covers your case, it happens I do have some other matters which it is just about time to take up.

Mr. Hardy: Your Honor, there are two or three points the claimant has raised I would like to discuss.

The Court: All right, let's proceed.
(Argument by Mr. Hardy.)

The Court: Do you desire to file a brief, Mr. Stapleton?

Mr. Stapleton: I do not. I believe the Court understands fully our position. I would be happy to if you like.

The Court: I won't pass on the law until I read some of these cases the government has filed in their brief. I want to extend them the courtesy of reading it since they have gone to the trouble of filing it. If you wanted to, I would give you a like opportunity.

Mr. Stapleton: I don't think so.

46 The Court: All right, I will take the case, and read the cases, and make an early decision, gentlemen. You have said you have appreciated the Court helping you dispose of the case. The Court appreciates the attitude of counsel. I think we have had the pre-trial conference work into an actual trial where we can dispose of it, rightly or wrongly. It saved considerable time for all of us, and the Court appreciates that, gentlemen.

United States of America, District of New Mexico, ss.

I Hereby Certify That the foregoing transcript is a true record of the matters herein recorded.

Done at Albuquerque, N. M., December 16, 1949.

E. E. GREESON, Court Reporter.

Clerk's Certificate.

65 I, Wm. D. Bryars, Clerk of the United States District Court for the District of New Mexico, do hereby certify that the above and foregoing, consisting of sixty-

four (64) pages, is a true copy of the record, proceedings and evidence designated by appellant for inclusion in the record on appeal in that certain action lately pending in this court, styled and numbered as shown in the title page to this transcript.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said court at Santa Fe, in said District, on this the 12th day of January, A. D. 1950.

WM. D. BYARS,
(Seal) Clerk of Said Court.

Filed, United States Court of Appeals, Tenth Circuit. January 16, 1950. Robert B. Cartwright, Clerk.

And thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Tenth Circuit:

Order: Cause Argued and Submitted.

Second Day, May Term, Tuesday, May 9th, 1950. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard, John T. Grigsby, Esquire, appearing for appellant, Benjamin F. Stapleton, Jr., Esquire, appearing for appellee.

On motion, appellant was granted leave to file typewritten copies of a reply brief herein instanter, which was accordingly done, printed copies to be substituted therefor as soon as the printing thereof can be accomplished.

Thereupon this cause was argued by counsel and submitted to the court.

Opinion.

[June 27, 1950.]

John T. Grigsby, Atty., Dept. of Justice (James M. McInerney, Asst. Atty. General, Everett M. Grantham, U. S. Atty., Albert H. Clancy, Asst. U. S. Atty., Vincent A. Kleinfeld, Atty., Dept. of Justice, Leonard D. Hardy, Atty., Federal Security Agency, were on the brief), for appellant. Benjamin F. Stapleton, Jr., (Ireland, Ireland, Stapleton and Pryor and Clarence L. Ireland, were on the brief), for appellee.

Before Phillips, Chief Judge, and Huxman and Pickett, Circuit Judges.

Phillips, Chief Judge.

This is an appeal from a libel brought by the United States pursuant to 21 USCA §334(a), seeking the seizure

and condemnation of 62 cases of fruit jam of assorted flavors. The libel alleged that the jam was misbranded within the meaning of 21 USCA §343(g), when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce, because it purported to be and was represented as a fruit jam, a food for which definitions and standards of identity had been prescribed pursuant to 21 USCA §341, and it failed to conform to such definitions and standards in that it was deficient in fruit and was not concentrated to the degree required by the standards.

21 USCA §341, in part, reads:

"Whenever in the judgment of the [Federal Security] Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality and/or reasonable standards of fill of container • • • ."

21 USCA §343, in part, reads:

"A food shall be deemed to be misbranded—

"(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated."

"(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, • • •."

The definitions and standards of identity for fruit jams, which were established pursuant to 21 USCA §341, after public proceedings, conducted in accordance with 21 USCA

§371(e), provide that fruit jams shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients, and that the soluble solids content of blackberry, strawberry and grape jam be not less than 68%, and of apricot, peach and plum jam, not less than 65%. The jams[1] under seizure contained the ingredients provided for in the standards, but the amount of fruit was greatly reduced. They contained 55% sugar, 25% fruit and 20% of a water solution of pectin and were labeled "Imitation (here was inserted the name of the fruit used) Jam."[2] Below the name of the fruit and word "Jam" on the label there appears in very small type the following:

"Made from 55% sugar, 25% fruit, 20% pectin, citric acid, 1/10 of 1% benzoate of soda."

The facts rest on stipulated admissions and agreement as to what persons would testify, if called as witnesses. It was thus established that the jams under seizure, when introduced into and while held in interstate commerce, failed to conform to the definition and standard of identity which had been prescribed for fruit jams pursuant to 21 USCA §341, in that they were deficient in fruit and were not concentrated to the degree required by the standard; that the five-pound two-ounce size of such jams was served by hotel dining rooms, restaurants and other public eating places to their patrons as fruit jam, without disclosure that the containers from which the food was taken were labeled "Imitation Jam"; that retail grocery stores advertised such jams as fruit jams, and in response to telephone calls from housewives, asking for the advertised jams, filled such orders with the product here involved; that ranches and logging camps served such jams to their employees as jam and such

[1]Such jams were grape, strawberry, apricot, plum, peach and blackberry.

[2]The name of the fruit and the word "Jam" were in larger and bolder letters than the word "Imitation."

employees consumed it, believing it to be fruit jam, and that such jams looked like and tasted like friut jam, and that such jams are wholesome and have food value.

The trial court found that the jams under seizure had the appearance of fruit jams for which a definition and standard of identity had been established; that such jams were made to taste like and did taste like standard fruit jams; that they were used by consumers in the place of and as a substitute for standard fruit jams; that they were often advertised as jam and that orders by the consuming public for jam were frequently filled by delivery of such jams; and that they were served by hotels in response to orders for jams or preserves without disclosure that they did not comply with the requirements for standard fruit jam. Notwithstanding these findings, the court concluded that the jams under seizure did not purport to be, and were not represented as fruit jam, and that they were imitation fruit jams and properly labeled under 21 USCA §343(c).

The jams under seizure contain fruit, sugar and the other usual ingredients of fruit jam; they look and taste like fruit jam, and they are sold and served to customers as fruit jam. They are a sub-standard jam. They are not imitation fruit jam. We think the undisputed facts show that they purported to be, and were represented to be a fruit jam, for which a definition and standard of identity had been prescribed.

The text and legislative history of the statute (Chapter IV of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, 1046, 21 USCA §341-346) show that its purpose was not confined to a requirement of truthful and informative labeling. The Pure Food and Drug Act of 1906 prohibited false and misleading labeling, but it had been found that such a prohibition was not adequate to protect the consumer from "economic adulteration" by the substitution of less expensive ingredients, or by diminishing the proportion of more expensive ingredients so as to make the product, although not deleterious, inferior to well-recognized stand-

ards adhered to by housewives and most manufacturers, and inferior to what the consumer expected to receive when purchasing it under the name it was sold.[3] (Sen. Rep. No. 493, 73d Cong., 2d Sess., p. 10; Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 10.) Congress, by §341 and §343(g), did not undertake to remedy the evil by a requirement of informative labeling. Rather, it authorized the Administrator to promulgate definitions and standards of identity, "under which the integrity of food products can be effectively maintained," (H.R. Rep. 2139, 75th Cong., 3d Sess., p. 2; H.R. Rep. 2755, 74th Cong., 2d Sess., p. 4) and provided for informative labeling only where no such standard had been promulgated; where the food did not purport to be a food for which a standard had been promulgated, or where the regulation permitted optional ingredients and required them to be set forth on the label. "The provisions for standards

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[3] Prior to the enactment of the Federal Food, Drug and Cosmetic Act of June 25, 1938, the United States brought a libel asking the seizure and condemnation of a food known as Bred Spred. It contained strawberry flavor, 17 parts of strawberries, 55 parts of sugar, 11½ parts of water, ¼ part of pectin and .04% of a part of tartaric acid. It was not deleterious, but it failed to meet the standards recognized for jam by manufacturers, of not less than 45 parts of fruit to 55 parts of sugar, and by housewives, of 50% fruit and 50% sugar. The trial court denied seizure and condemnation and on appeal the court of appeals affirmed. See United States v. 10 Cases More or Less, Bred Spred, 8 Cir., 49 F. 2d 87.
In H.R. Rep. 2139, 75th Cong., 3d Sess., p. 5, the following appears:

> "Section 401 [21 U.S.C. 341] provides much needed authority for the establishment of definitions and standards of identity and reasonable standards of quality and fill of container for food. One great weakness in the present food and drugs law is the absence of authoritative definitions and standards of identity except in the case of butter and some canned foods. The Government repeatedly has had difficulty in holding such articles as commercial jams and preserves and many other foods to the time-honored standards employed by housewives and reputable manufacturers. The housewife makes preserves by using equal parts of fruit and sugar. The fruit is the expensive ingredient, and there has been a tendency on the part of some manufacturers to use less and less fruit and more and more sugar.
>
> "The Government has recently lost several cases where such stretching in fruit was involved because the courts held that the well-established standard of the home, followed also by the great bulk of manufacturers, is not legally binding under existing law."

of identity thus reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of products superficially resembling each other.'"[4]

It is significant that Congress in §343(g) in, dealing with misbranding by failure to conform to the definition and standard of identity, did not permit departure from the standard if the label disclosed that the food did not conform to the standard, whereas in §343(h)(1)(2), in dealing with misbranding by failure to conform to standard of quality and standards of fill of container, Congress permitted departure from the standard if the label on the food set forth, in the manner and form specified in the regulation, a statement that it fell below the standard, thus indicating a Congressional intent to permit departure from standards of quality and fill of container, where such departure was shown by truthful labeling, but not to permit a departure from a definition and standard of identity, even though such departure was disclosed by the label.

Whether a food purports to be, or is represented to be, a food for which a definition and a standard of identity has been prescribed by regulation, is not to be determined solely from obscure disclosures on the label. If it is sold under a name of a food for which a definition and standard has been prescribed, if it looks and tastes like such a food, if it is bought, sold and ordered as such a food, and if it is served to customers as such a food, then it purports to be, and is represented to be, such a food.[5]

We conclude that the jams under seizure purported to be, and were represented to be, fruit jams, for which a definition and standard of identity had been promulgated;

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[4] Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 230; Libby, McNeill & Libby v. United States, 2 Cir., 148 F. 2d 71, 73; United States v. 716 Cases, More or Less, etc., Del Comida Brand Tomatoes, 10 Cir., 179 F. 2d 174.

[5] Libby, McNeill & Libby v. United States, 2 Cir., 148 F. 2d 71, 73.

that they did not conform to the definition and standard of identity, and that the manufacturer could not escape the impact of §341 and §343(g) by labeling them imitation jams and by truthfully setting forth on the label the proportions of sugar, fruit and other ingredients contained therein.

It is urged that the effect of our decision will be to compel the manufacturer of these jams to take such product off the market and to deprive persons of modest means of an inexpensive and wholesome food product; and that the portion of the Senate Committee Report set forth in Note 6, infra, shows the Congress did not intend the operation of §343(g) to produce such results. But the results envisioned will not necessarily follow. The manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin, but the product may not be lawfully sold or served to customers under the name fruit jam and in such a manner that it purports to be, or is represented to be fruit jam.[6]

The judgment is reversed and the cause remanded with instructions to enter a judgment for condemnation.

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[6] In Sen. Rep. 361, 74th Cong., 1st Sess., p. 8, the following appears:

> "It should be noted that the operation of this provision [Section 343(g)] will in no way interfere with the marketing of **any food which is wholesome but which does not meet the definition and standard**, or for which no definition and standard has been provided; but if an article is sold under a name for which a definition and standard has been provided, it must conform to the regulation. This does not preclude the use of distinctive individual brands. But the loophole afforded the dishonest manufacturer by the so-called 'distinctive name' proviso of the present law will be closed. Under that proviso adulterated and imitation products sold under such names were immune from action. It is not intended that the authorization to make standards of identity shall apply to foods which are truly proprietary, that is, foods distinctive in content as well as in name, in the manufacture of which some person or concern has exclusive proprietary rights." (Boldface ours.)

Pickett, Circuit Judge, dissenting.

Section 341 of the Federal Food, Drug and Cosmetic Act of 1938[1] gives the Federal Security Administrator authority to promulgate regulations fixing and establishing for any food a reasonable definition and standard of identity. The government's position in this case is that "irrespective of what an article of food may consist or the nature of its labeling," it violates the Act "if it purports to be a food for which a definition and standard of identity * * * has been prescribed and does not conform thereto." It says "the fact that the article may or may not be an imitation, or labeled as such, has no bearing * * * upon the question as to whether or not it violates Section 343(g)," It frankly stated to the court that the purpose of this libel was to establish a principle which would bar from interstate trade all substandard or imitation foods regardless of the label if they purported to be foods for which standards had been prescribed. It construed the word "purport" to mean any food which looks and tastes like and is sold and used for the same purpose as that food for which standards are fixed.

If the Government's construction of the statute is correct, then no form of label would permit entry of the seized product into the channels of interstate trade. If its sale is permitted under any form of label it would still look and taste like standard jam, it would be sold and used for the same purpose as standard jam, it would still be purchased and served as jam by hotels and restaurants, it would still be purchased and used as jam by ranchers, logging camps and large families looking for a cheaper but nutritious and wholesome food. To me there is no middle ground; we either accept or reject the government's position. If the product is permitted to be sold under some descriptive label or by a distinctive name, although not meeting the standards, the same objections will be advanced as they were to

[1] Title 21 U.S.C.A. 341.

the "Bred Spred" case. U. S. v. Ten Cases, more or less, Bred Spred, 8 Cir., 49 F. 2d 87.[2]

It is clear to me that the very purpose of Section 343(c)[3] is to permit on the market a wholesome and nutritious food which is within the means of a great mass of our people who are unable to purchase the standard products. At the time the bill was being considered by Congress, the Food and Drug Administration so recognized the necessity for such products.[4] Senator Copeland who sponsored the bill recognized the right to sell substandard foods, said, "It should be noted that the operation of this provision will in no way interfere with the marketing of any food which is wholesome but which does not meet the definition and standard, or for which no definition and standard has been provided." Dunn, Federal Food, Drug and Cosmetic Act, page 246. The administrator construed the Act to permit a substandard article to be labeled as an "imitation" at least as late as 1941 and took no different view until 1945, Kleinfeld & Dunn, Federal Food, Drug and Cosmetic Act 1938-1949, p. 627, 712. Until this action was brought the label on products of the claimant was never questioned by

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[2] The distinctive name provision was left out of the 1938 Act because of this and similar decisions. H. Rep. No. 2139, 75th Cong. 3 Sess., p. 5.

[3] Title 21 U.S.C.A. 343 (c): "If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated."

[4] Walter G. Campbell, Chief of the Food and Drug Administration, testifying before a subcommittee in the House of Representatives in connection with this identical type of product, said:

"Mr. Kenney. What is the other ingredients besides the fruit?

"Mr. Campbell. There is fruit, sugar, and pectinous material acquired from fruit, which is just a gelatinizing agent, that enables you to incorporate large quantities of water, all in lieu of the one-fourth amount of fruit deficient in that product as compared with the standard preserve. So that water and pectin have been substituted. * * *

"Mr. Chapman. What effect would the provision of Senate 5 have on the manufacture and sale of a product like that?

"Mr. Campbell. Senate 5 provides for standards. That product would be a substandard article and its marketing as a preserve would be proscribed.

the Administrator, in fact it is the label suggested by him. He does not question its sufficiency now. It was designed to meet the requirements of 343(c) by showing that the product did not meet the standards but was an imitation. No other word or combination of words in the English language could be used which would so well call to the attention of the purchasing public the fact that the labeled food was not a standard product. It is a word of common usage and understanding. Webster defines it to mean: "the form of something regarded as a pattern or model * * * an artificial likeness * * * simulating something superior, esp. something more costly." Necessarily any imitation would have the appearance of that which it imitates. In this case the jam did look and taste like that which meets the prescribed standard but it is labeled "imitation" in the manner required by the statute. If the section is not given this construction it is meaningless.

The government relies strongly upon the Quaker Oats decision in the Supreme Court[5] and the Catsup case in the Second Circuit.[6] These cases involved foods which were

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[4]Continued—

"Mr. Chapman. That would be shown on the label?

"Mr. Campbell. It would have to be shown on the label just what it was, and enable the consumer to buy it for what it was.

"There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for what it is, without deception, should be permitted the channels of commerce. There can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying.

"There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it.

"Mr. Chapman. It contains no injurious ingredient?

"Mr. Campbell. It contains no injurious ingredient. But the point that it illustrates, Mr. Chapman, is that the distinctive trade name proviso, which I read to you in the present act, offers a means by which a complete circumvention of the requirements of that law can be effected.

"S.5 is silent on distinctive names. It eliminates that particular provision which, as I said, is a sin of commission."

Hearing before a Subcommittee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, H.R. 6906, H.R. 8805, H.R. 8941 and S. 5.

Dunn, Federal Food, Drug and Cosmetic Act, page 1239.

[5]Fed. Security Administrator v. Quaker Oats Co., 318 U.S. 218.

[6]Libby, McNeill & Libby v. U. S., 2 Cir., 148 F. 2d 71.

being sold as standard products. Each recognized that informative labeling could be used "where the food did not purport to comply with the standard."

A large portion of the food consumed today comes within the provisions of the Act. To sustain the government's position here gives the Federal Security Administrator absolute control over the ingredients of all such foods. He will have the right to standardize the same, which will mean virtually a standardization of the price. It will remove from the market a nutritious and wholesome food which sells for approximately one-half the price of the standard product. The purchasing public, regardless of their ability to pay, will be forced to purchase the same quality of food. I cannot believe Congress had any such intent. I would affirm the trial court.

Judgment.

Twenty-Second Day, May Term, Tuesday, June 27th, 1950. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said district court with instructions to enter a judgment for condemnation.

Petition for Rehearing.

Claimant-Appellee respectfully petitions the Court to grant it a rehearing and to reconsider its opinion filed herein on June 27, 1950, for the following reasons:

I.

The majority opinion failed to give weight to the plain ordinary meaning of the word "imitation" on the label of the seized article. The majority of the court evidently took the position that the word "jam" on the label constituted a representation that the product was the standardized article, even though the label bears, in type uniform size and prominence, the word "imitation" and immediately thereafter, the name of the food imitated. The imitation provision of the 1938 Act, Section 343 (c) must be given the meaning that Congress intended that it should have. The majority opinion has made 21 U. S. C. A. 343 (c) absolutely meaningless. Under its view even a food for which no standard of identity has been established would be represented as a genuine article even though such article bore an imitation label in conformity with Section 343 (c).

II.

The majority opinion indicated in footnote 2 at Page 3 of the typewritten opinion that the label was not printed in conformity with 21 U. S. C. A. 343 (c). The court states that "the name of the fruit and the word 'Jam' were in larger and bolder letters than the word 'Imitation'." The government at no time contended nor does it now contend that the label did not conform with 21 U.S.C.A. 343 (c). In fact, the claimant-appellee changed its label from "compound jam" to the present label at the request of and with the approval of the Food and Drug Administration. The court therefore erred in stating that the label of the seized article does not meet the requirements of Section 343 (c). In interpreting the decision of the court, it would be most unfortunate to distinguish this case on the ground that the label did not comply with the requirements of Section 343 (c) when the correctness of the label was not disputed by the government.

III.

The court erred in overruling the finding of the trial court that "the articles of food seized purport to be and are

represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else." (Finding of Fact 16, R. 23.)

Since this finding of fact was adequately supported by evidence adduced by the trial court, it was conclusive and binding on appeal. The court erred in disregarding this finding of fact. Furthermore, since the product, under the finding of fact of the trial court, did not purport to be standard fruit jam and was not represented to be standard fruit jam, the court erred in considering Section 343 (g) in reaching its conclusion.

IV.

The court erred in failing to consider that for many years the position of the Administrator was that products such as the one seized in the instant case must be marketed as "imitation jam." Trade Correspondence No. 151 issued March 7, 1940 required the marketing of a tomato product that did not meet the standard for Tomato Puree as "Imitation Tomato Puree." Kleinfeld and Dunn, Federal Food, Drug, and Cosmetic Act, Pages 627-628. Similarly the Food and Drug Administrator argued in Land O'Lakes Creameries, Inc. et al vs. McNutt et al, 132 F. 2d 653, 658, that the provision as to standards of identity (Section 341) and the imitation provision [Section 343 (c)] are not conflicting and are independent of one another. Prior to this case, with the exception of one public utterance, the Food and Drug Administrator has sanctioned imitation products such as the ones seized in this case. The court should have given weight to the established regulations of the Administration and its argument in the Land O'Lakes case upon which so many honest businessmen have relied in good faith.

V.

The court erred in suggesting that the product seized could be marketed as "syrup and fruit thickened with pectin or syrup flavored with fruit and thickened with pectin." Although both the majority and dissenting opinions agree

that the product may be marketed in interstate commerce, the labeling suggested by the court would subject the products to immediate seizure as misbranded foods under Section 343 (g).

VI.

The majority opinion has laid much stress on 21 U.S.C.A. 343 (h) (1) (2) in reaching its conclusion that Section 343 (g) does not permit a departure from the standard even though the food is labeled "imitation" in accordance with Section 343 (c). Section 343 (h) (1) (2) read as follows:

"A food shall be deemed to be misbranded—

"(h) If it purports to be or is represented as—

"(1) a food for which a standard of quality has been prescribed by regulations as provided by section 341, and its quality falls below such standard, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or

"(2) a food for which a standard or standards of fill container have been prescribed by regulations as provided by section 341, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard."

It is submitted, however, that the court should not confuse standards of quality and fill of container with standards of identity. If Congress had desired to eliminate imitations from interstate commerce, once standards of identity had been established for the food so imitated, it had clear and unequivocal language in the drug sections of the act to use as a guide. Had Congress desired such a result in the food laws, it would have simply used the words of Section 352 (i) (2) which read as follows:

"A drug or device shall be deemed to be misbranded—

"(i) (2) if it is an imitation of another drug."

In Section 352 (i) (2) there is no qualification or condition for the marketing of drugs dependent upon any manner or method of labeling. If Congress had intended to eliminate the imitation provision of Section 343 once standards of identity had been established for the food imitated, specific statutory language to achieve such a result in clear and unequivocal language was at its command.

VII.

This case was admittedly brought by the Food and Drug Administration as a Test Case to enable the Administrator to obtain a guide or guides from the Court as to the meaning of the imitation section of the 1948 Act, Section 343 (c). It was and is the hope and desire of both the appellee and the appellant that the court give to the food industry and the Federal government an interpretation of Section 343 (c). Instead the court in effect eliminated Section 343 (c) of the act without once mentioning that section in the body of the opinion. Since the case before the court is one of the most important cases brought under the 1938 Act, and since the decision will in effect destroy businesses that have developed under government supervision and control based upon Section 343 (c), the government and those in business who are conscientiously and honestly attempting to adhere to the statutory directives of their government are entitled to know on what grounds and for what reasons, in the face of statutory background of its specific meaning and purpose, Section 343 (c) is by judicial interpretation stricken from the Food, Drug, and Cosmetic Act.

VIII.

The reasoning of the court as to substandard jam is in error. The court on page 5 of its opinion states as follows: "They are a substandard jam. They are not an imitation jam." As the dissenting opinion clearly points out, "imitation" as defined by Webster, means "simulating something superior, especially something more costly." "No other word or combination of words in the English language

could be used which would so well call the attention of the purchasing public to the fact that the labeled food was not a standard product." If the article under seizure labeled "imitation" in conformity with Section 343 (c) is not an imitation jam, what is an "imitation fruit jam"? The statute states in effect that substandard products may be marketed in interstate commerce if they are marked imitation, yet the court takes the position that the product seized is not an imitation product even though it is a substandard jam plainly marked "imitation." The court should clarify its position as to what is an "imitation fruit jam."

IX.

The court erred in considering the evidence that the product under seizure was served by hotel dining rooms, restaurants and other public eating places, and that ranches and logging camps served such jams to their employees as jam. The Act only contemplated the question of whether or not the product is misbranded at the time of its sale to the ultimate purchaser. Whether or not it is desirable to amend the act to insure protection, if any protection is necessary, to the ultimate consumer is immaterial at this juncture. The act was intended only to protect the ultimate purchaser and not the ultimate consumer. The appellee objected to the introduction of evidence as to service in hotels, logging camps, in the trial court (R. 43, 44) and the court erred in giving any consideration to this evidence. This court in U. S. vs. 716 Cases, More or Less, etc., Del Comida [illegible] Tomatoes, 179 F. 2d 174, recognized that the effect of [illegible]'38 Act was to protect the ultimate purchaser as opposed to the ultimate consumer, and the court should have rejected any consideration of the ultimate consumer in rendering its decision in this case.

X.

The court erred in attempting to apply Libby, McNeill and Libby vs. U. S., 148 F. 2d 71; U. S. vs. 716 Cases, More or Less, etc., Del Comida Brand Tomatoes, supra, and Federal Security Administrator vs. Quaker Oats Company, 318

U. S. 218, to the instant case. In none of these cases, was the product seized, labeled "Imitation." In none of these cases was the imitation provision of the Act, Section 343 (c), in any manner whatsoever involved in the decisions. These cases hold simply that once standards of identity have been established, deviations from these standards will not be permitted even though the deviations are truthfully stated on the labels. These cases cannot be cited for the legal proposition before this court, namely can there be imitations of a standard product? If Congress had intended to eliminate imitations it could have used the language of the drug section, Section 352 (i) (2), which reads as follows:

"A drug or device shall be deemed to be misbranded * * * if it is an imitation of another drug."

The intent of Congress, as evidenced by the many hearings and Committee reports, was to sanction imitations of standardized products in interstate commerce if said products conformed with the labeling requirements of Section 343 (c). Congress intended and did create a specific exception to Section 343 (g), and the court is in error in citing the Libby, Quaker Oats, and Del Comida cases as contrary authority.

By virtue of the reasons for rehearing set forth above, we respectfully request that the court reconsider its original opinion herein, and upon rehearing withdraw said opinion and affirm the judgment of the lower court.

Respectfully submitted,

BENJAMIN F. STAPLETON, JR.,
CLARENCE L. IRELAND,
802 Midland Savings Buliding,
Denver 2, Colorado,
Attorneys for Claimant-Appellee
Pure Food Manufacturing
Company.

Of Counsel:

Ireland, Ireland, Stapleton and Pryor.

Certificate.

We hereby certify that the foregoing petition for rehearing is not filed for delay, but is filed in good faith in the firm belief that it is meritorious.

CLARENCE L. IRELAND,
BENJAMIN F. STAPLETON, JR.,
802 Midland Savings Building,
Denver 2, Colorado,
Attorneys for Claimant-Appellee

Filed July 15, 1950.

Suggestion for Modification of Opinion.

The Government respectfully requests that the penultimate paragraph of this Court's opinion, which states in part that the "The manufacturer may market the product as syrup and fruit thickened with pectin" or "syrup flavored with fruit and thickened with pectin * * *," be deleted. The reasons for this request are the following.

It is submitted that such paragraph is, in reality, dictum which does not deal with the specific problem before this Court; and that it may be misconstrued so as to support a contention which would place the consumer in a most disadvantageous position, and render null and void one of the most important and salutary provisions inserted in the Federal Food, Drug, and Cosmetic Act for the specific purpose of remedying a serious weakness in the predecessor Food and Drugs Act of 1906. The opinion of the Court in footnote 6, quotes from Senate Report No. 361, 74th Cong., 1st Sess., page 8, which refers to the plain policy of Congress that the operation of 21 U. S. C. 343 (g) shall not interfere in any way with the marketing of "any food which is wholesome but which does not meet the definition and standard," and that "This does not preclude the use of distinctive individual brands." The Committee Report, however, continues by stating specifically that the loophole

afforded the dishonest manufacturer by the so-called "distinctive name" proviso of the Food and Drugs Act of 1906 will be closed.

The Government urges that the Committee report points out most clearly the clear intent of Congress to bar from the channels of interstate commerce a product such as is involved in this case regardless of the name it bears, because it is a substandard illegal product. It seems obvious that the Committee report reveals that the penultimate paragraph of this Court's opinion would be a deviation from the policy of Congress and the clear intent of the statute.

The opinion of the Court, in footnote 3, refers to the opinion in the Bred Spred case (49 F. 2d 887 (C. A. 8)), and to an excerpt from H. R. 2139, 75th Cong., 3d Sess., which discloses the design of Congress to remedy the serious weakness in the Food and Drugs Act of 1906 revealed by that decision. As indicated above, the lack of any provision in the old law which would prevent the marketing of a substandard fruit jam by the use of another name or description was obviously one of the weaknesses in the old law which was sought to be remedied.

The Act is not designed to outlaw a wholesome product which does not meet a definition and standard of identity and which is sold under a distinctive individual brand or name, provided that the product, as specifically pointed out in the Senate Report referred to above, is likewise truly distinctive or proprietary as distinguished from a common article such as jam. The Government has never contended, and does not now contend, that any wholesome food product is barred from the channels of interstate commerce by the Federal Food, Drug, and Cosmetic Act, if it is in fact truly distinctive in content as well as in name. The entire contention is that a product such as appellee's is barred only when it has such potentiality of deception to the ultimate consumer, as when it is a substandard standardized food, as to make it purport to be the standardized food and violate 21 U. S. C. 343 (g).

Take the product involved in this case. True, it is a wholesome product, as was farina with vitamin D, involved in the Quaker Oats case, and as was tomato catsup with preservative, involved in the Libby, McNeill & Libby case. But in those two cases, as well as in the present action, the products were not distinctive products but rather, in reality, the products covered by the respective definitions and standards of identity but made in violation thereof. Thus, in its opinion, this Court refers specifically to the fact that the jams under seizure "are a substandard jam." A substandard jam, of course, purports in every respect to be standardized jam, is not a distinctive or proprietary product, and necessarily has within it the potentiality of deception to the ultimate consumer revealed by the facts in the present case. The ultimate consumer cannot possibly realized that the product which he is consuming is in reality a substandard and not a distinctive product, and a truthful label which may once have been on the container is no protection whatever to him and certainly does not make the product a distinctive one. It is presumably for that reason that Congress, in 21 U. S. C. 343 (g), provided that a food shall be deemed to be misbranded "If it purports to be or is represented as" a standardized food unless it conforms to the standard. A food product which does not bear the name of a standardized food may not be represented as the standardized product; but the name is only one item to be taken into consideration in determining whether the product purports to be the standardized food.

In other words, the Government's position is precisely that pointed out by the Senate Committee on Commerce in Senate Report No. 361, 74th Cong., 1st Sess., referred to above. There is *no* design to outlaw wholesome products which do not purport to be the standardized products and which thus do not possess the inherent potentiality of deception which no labeling can cure. But it is the clear design of the Act to outlaw a product such as that involved in this case, which is clearly not a distinctive product but a substandard standardized product which, as this Court

pointed out in its opinion, was served by hotel dining rooms, restaurants, and other public eating places to their patrons as fruit jam, was advertised by retail grocery stores as fruit jam and was used to fill orders for fruit jam, was served by ranches and logging camps to their employees as fruit jam, etc. Labeling such a substandard and non-distinctive product with a distinctive name such as "syrup and fruit thickened with pectin" or "syrup flavored with fruit and thickened with pectin," would obviously have no effect upon such factual situations.

This construction of 21 U. S. C. 343 (g) is not only entirely consistent with the language and legislative history of the Act but is in accord with the remedial design of the statute to protect the consumer, which has caused the Courts with unanimity to construe it liberally. As stated by the Supreme Court in United States v. Dotterweich, 320 U. S. 277, 280:

> The purposes of this legislation thus touch phases of the lives and health of people, which, in the circumstances of modern industrialism, are largely beyond self-protection. Regard for these purposes should infuse construction of the legislation if it is to be treated as a working instrument of government and not merely as a collection of English words.

We respectfully submit this matter for such consideration as to the Court may seem proper.

JAMES M. MCINERNEY,
Assistant Attorney General.
VINCENT A. KLEINFELD,
JOHN T. GRIGSBY,
Attorneys, Department of Justice.

I certify that in my judgment this petition is well founded and that it is not interposed for delay.

JAMES M. MCINERNEY,
Assistant Attorney General.

Filed July 17, 1950.

Order Denying Petition for Rehearing and Motion to Modify Opinion.

Thirty-Third Day May Term, Saturday, July 22nd, 1950. Before Honorable Orie L. Phillips, Chief Judge, and Honorable Walter A. Huxman and Honorable John C. Pickett, Circuit Judges.

This cause came on to be heard on the petition of appellee for a rehearing herein and the motion of appellant to modify the opinion herein, and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition and motion be and the same are hereby denied.

On August 2, 1950, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of New Mexico.

Clerk's Certificate.

United States Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the United States District Court for the District of New Mexico, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Court of Appeals for the Tenth Circuit in a certain cause in said United States Court of Appeals, No. 4039, wherein United States of America was appellant, and 62 Cases, more or less, each containing six jars of jam, assorted flavors, net wt. 5 lbs. 2 ozs., shipped

by the Pure Food Manufacturing Company, Denver, Colorado, was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 16th day of August, A. D. 1950.

(Seal, U. S. Court of Appeals, Tenth Circuit)

ROBERT B. CARTWRIGHT,
Clerk of the United States Court of Appeals, Tenth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

No. 363

ORDER ALLOWING CERTIORARI—Filed November 27, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 363

62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 3 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO,
Libellee - Petitioner,
PURE FOOD MANUFACTURING COMPANY,
Claimant - Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PEERLESS PRINTING COMPANY, DENVER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No.

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62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 3 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO,
Libellee - Petitioner
PURE FOOD MANUFACTURING COMPANY,
Claimant - Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To The Honorable, The Chief Justice of The United States, and to The Honorable Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit which reversed the judgment of the United States District

Court for the District of New Mexico, and sustained the libel of information instituted by the United States of America under 21 U.S.C. Sec. 341, against 62 Cases, More or Less, Each Containing Six Jars of Jam, Assorted Flavors, Net Wt. 5 Lbs., 3 Oz., shipped by the Pure Food Manufacturing Company.

OPINIONS BELOW.

The majority opinion of the Court of Appeals appears in the record (R. 57) and if officially reported in 183 F. 2d 1014; the dissenting opinion also appearing in the record (R. 64) is officially reported in 183 F. 2d 1014, 1016. The opinion of the District Court also appears in the record (R. 25) and is reported in 87 F. Supp. 735.

JURISDICTION.

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on June 27, 1950. (R. 67) Thereafter, on July 15, 1950, and within the time allowed therefor, a petition for rehearing (R. 67) was filed which was denied on July 22, 1950. On July 17, 1950, the respondent, the United States of America, filed a "Suggestion for Modification of Opinion" (R. 74) which was denied on July 22, 1950. Jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED.

Whether "imitation jam" labeled as an "imitation" food in conformity with the provisions of 21 U.S.C. 343 (c) is subject to seizure as a misbranded food under 21 U.S.C. 343 (g) if said "imitation jam" fails to meet the definition and standard of identity for pure fruit jam.

STATUTES INVOLVED.

The pertinent provisions of the Federal Food, Drug, and Cosmetic Act of 1938 (52 Stat. 1040, 21 U.S.C. 301) are as follows:

21 U.S.C. 334 (a). Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *. (52 Stat. 1044)

21 U.S.C. 341. Whenever in the judgment of the (Federal Security) Administrator such action will promote honesty and fair dealing in the interest of the consumer, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, * * *. (52 Stat. 1046)

21 U.S.C. 343 (c). A food shall be deemed to be misbranded—If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated. (52 Stat. 1047)

21 U.S.C. 343 (g). A food shall be deemed to be misbranded—If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, * * *. (52 Stat. 1047)

STATEMENT OF THE CASE.

The libel of information filed by the United States of America in the United States District Court for the District of New Mexico alleged that the food seized, namely, 62 cases, more or less, each containing six jars of jam, assorted flavors, net wt. 5 lbs., 3 oz., was misbranded within the meaning of 21 U.S.C. 343 (g) when introduced and while in interstate commerce and while held for sale after shipment in interstate commerce, in that it purported to be and was represented as fruit jam, a food for which definitions and standards of identity had been prescribed pursuant to 21 U.S.C. 341. The definitions and standards of identity for Fruit Preserves, 21 C.F.R. 29.0, pp. 81-84 (1949 ed.), provided that these foods shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients; and the soluble solids content of blackberry, strawberry and grape jam be not less than 68% and the apricot, peach and plum jam not less than 65%. The petitioner freely admitted that the jams under seizure contained 25% fruit and a 20% water solution of pectin.

The defense of the petitioner was that the products were properly labeled "imitation jam", and hence were sanctioned under the specific authority of 21 U.S.C. 343 (c).

The government contended that once standards of identification had been promulgated for pure fruit preserves, petitioner could no longer manufacture "imitation jams" even though the imitation products conformed to the requirements of 21 U.S.C. 343 (c). The government's position is that the "imitation jam" purported to be or was represented to be pure jam, and since the "imitation jam" did not meet the definitions and standards for pure fruit preserves, it was therefore misbranded under 21 U.S.C. 343 (g).

There is no contention whatsoever by the Government that the products seized are unwholesome or unfit for human consumption; indeed the lower court found that the articles seized had food value and were wholesome and in every way fit for human consumption. (Finding of Fact 5, R. 22) The good faith and integrity of the claimant in manufacturing and marketing the product seized was not and is not challenged in this case.

The trial court found that the "imitation jam" so seized was sold in interstate commerce without deception (Finding of Fact 17, R. 23); that the articles of food so seized purport to be and are represented to be "imitation fruit preserves," and purport to be nothing else and are represented as nothing else. (Finding of Fact 16, R. 23)

The trial judge, the Honorable Carl A. Hatch, former United States Senator from the State of New Mexico and a member of Congress during the period of the enactment of the Food, Drug, and Cosmetic Act of 1938, held:

> "the product in question is an imitation of another food. It does not pretend to be anything else. . .
>
> "Any person reading sub-section c [343 (c)] and even in connection with sub-section g [343 (g)] would reasonably come to the conclusion that if the imitation of another food has a label bearing, in type of uniform size and prominence, the word "imitation" and immediately after the name of the food imitated, such food so labeled would not be misbranded. . .
>
> "If sub-section (c) is to be amended to prevent imitation of an article of food for which definitions and standards have been established, the same should be done by legislative action in clear language easily read and understood by citizens, such as the claimant in this action, who seek only to know the mandates of the statute in order that they may comply with the same. Such an extension of language should never be made by administrative action or judicial construction." (R. 26, 27)

The majority opinion of the Court of Appeals for the Tenth Circuit, without even discussing either the evidence adduced or the finding of fact of the trial court that the product seized purported to be and was represented to be "imitation jam," and purported to be and was represented to be nothing else (finding of Fact 16, R. 23), reversed the decision of the trial court and instead held that the food seized purported to be pure fruit preserves, and hence was misbranded. (R. 62, 63)

The majority of the Court, however, in their anxiety to answer the arguments of the dissenting opinion and in a firm belief that the product should be allowed the channels of interstate commerce stated:

> "the manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin." (R. 63)

The dissenting judge would have affirmed the trial court on the grounds that since the food was labeled "imitation" in conformity with 21 U.S.C. 343 (c), to declare the food misbranded would render section 343 (c) meaningless. (R. 66)

The dissenting opinion concludes as follows:

> "A large portion of the food consumed today comes within the provisions of the Act. To sustain the government's position here gives the Federal Security Administrator absolute control over the ingredients of all such foods. He will have the right to standardize the same, which will mean virtually a standardization of the prices. It will remove from the market a nutritious and wholesome food which sells for approximately one-half the price of the standard product. The purchasing public, regardless of their ability to pay, will be forced to purchase the same quality of food. I cannot believe Congress had any such intent. I would affirm the trial court." (R. 67)

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that the seized articles of food were misbranded.

(2) In failing to give weight to the plain ordinary meaning of the word "imitation" on the labels of the seized articles.

(3) In failing to consider the intent of the Congress of the United States to sanction "imitation" foods in interstate commerce.

(4) In disregarding the finding of the trial court that the articles of food seized purport to be and are represented as "imitation fruit preserves" and purport to be nothing else and are represented as nothing else.

(5) In failing to consider that for many years the official position of the Food and Drug Administration was that products similar to those seized in this case *must* be labeled and marketed as "imitation jam."

(6) In stating that the product seized could be marketed as "syrup and fruit thickened with pectin, or syrup flavored with fruit and thicked with pectin."

(7) In attempting to apply *Federal Security Administration v. Quaker Oats Company*, 318 U. S. 218, *Libby, McNeill & Libby v. United States*, 148 F. 2d 71 (C.A. 2), and *United States v. 716 Cases, More or Less, etc., Del Comida Brand Tomatoes*, 179 F. 2d 174 (C.A. 10) to the instant case.

(8) In enforcing the seizure provisions, 21 U.S.C. 334, against food products which were not misbranded "while held for sale after shipment in interstate commerce."

(9) In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The questions presented in this case are indeed novel and unique and are questions not previously determined by either this or any other court. Obviously then, there are no conflicting decisions to induce this Honorable Court to grant the writ. These questions are therefore ones of first impression.

The questions here before the court were drawn up by the Government in what had been hoped would be an ideal factual background for the determination of the question of whether or not "imitation jams" conforming to 21 U.S.C. 343 (c) marketed in the channels of interstate commerce could be seized as misbranded under 21 U.S.C. 343 (g) once Definitions and Standards of Identity had been established for fruit preserves. To the Government, this case was to be a test case to determine this question so important not only to the many manufacturers of "imitation" foods throughout the country but also to the millions of consumers of "imitation jams" who are purchasing a wholesome food product at half the price of pure fruit jams. (Finding of Fact 13, R. 23)

The best efforts of the Government and the petitioner have obviously gone astray. To allow the majority opinion of the Court of Appeals for the Tenth Circuit to stand as the law on this most important subject would be to throw the whole "imitation" question into such confusion as existed prior to the passage of the Food, Drug, and Cosmetic Act of 1938, and to recognize the existence of a type of labeling that the 1938 Act had, up to the rendering of the decision by the Court of Appeals, specifically eliminated.

Both petitioner and respondent recognized the grave peril occasioned by the majority opinion, and in an unprecedented action both parties to the litigation petitioned the Court for the removal of its unfortunate language.

The petitioner filed a motion for rehearing. (R. 67) The Government filed a "Suggestion for Modification of Opinion" (R. 74) to achieve the same result. Both petition for rehearing and "Suggestion for Modification of Opinion" were denied.

The language of the majority opinion of the Court of Appeals which will wreak such confusion and chaos on the Food and Drug Administration, the manufacturers of food products, and the consuming public is quoted in full as follows:

> "It is urged that the effect of our decision will be to compel the manufacturer of these jams to take such product off the market and to deprive persons of modest means of an inexpensive and wholesome food product; and that the portion of the Senate Committee Report set forth in Note 6, infra, (Sen. Rep. 361, 74th Congress, 1st Sess., p. 8) shows the Congress did not intend the operation of 343 (g) to produce such results. But the results envisioned will not necessarily follow. The manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin, but the product may not be lawfully sold or served to customers under the name fruit jam and in such a manner that it purports to be, or is represented to be fruit jam." (R. 63)

This Honorable Court can easily imagine the confusion to the consuming public in purchasing from a grocer's shelf a food labeled "strawberry syrup and fruit thickened with pectin."

The Congress of the United States and the Food and Drug Administration, operating under the Former Food and Drug Act of 1906, had experienced confusion to the consuming public similar to that invited by the Court of Appeals in the instant case.

Prior to the enactment of the Federal Food, Drug, and Cosmetic Act of 1938, a product was marketed labeled "Bred-Spred." This product resembled pure fruit jam,

purported to be and was represented as pure fruit jam. And yet the product contained less than one-half the amount of fruit required by the customary standards of the trade for fruit jam. Although containing less costly ingredients, "Bred-Spred" sold at a price only slightly less than the price for products containing the requisite amount of fruit.

The Government instituted proceeding against "Bred-Spred." The defense of the product rested on Section 8 of the Food and Drug Act of 1906, 34 Stat. 771, 21 U.S.C., 10, which provided in part as follows:

> "Provided, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> "First. In the case of mixtures of compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> "Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale."

The Court held that "Bred-Spred" since it did not contain any "poisonous" or "deleterious" ingredients was not misbranded by authority of the distinctive name provision of the statute quoted above. *United States v. Ten Cases, More or Less, "Bred-Spred,"* 49 F. 2d 87 (C.A. 8).

Walter G. Campbell, Chief, Food and Drug Administration, Department of Agriculture, in an appearance be-

fore a subcommittee of the Senate Committee on Commerce on December 7, 1933, stated as follows:

> "The Bill S. 1944 (which with amendments not pertinent to this argument became the Food, Drug, and Cosmetics Act of 1938) as framed eliminates that objectionable provision of the act which makes it possible, by the employment of some fanciful designation like the term 'Bred-Spred' to market a product under the legal assurance that it will be subject to none of the prohibitions of the act as applied to all types of foods and drugs, with the single exception that it must contain no added poisonous ingredients," Dunn, *Federal Food, Drug and Cosmetic Act*, Page 1052.

Although the "imitation" section of the 1906 Act was retained as 21 U. S. C. 343 (c), the Federal Food, Drug, and Cosmetic Act of 1938, deleted the distinctive name provision of the 1906 Act in an attempt to eliminate the apparent dangers of the "Bred-Spred" case. As a result of the enactment of the 1938 Act, up until the institution of this action, only standard and imitation food products were sanctioned in interstate commerce.

In the opinion of petitioner, however, the majority opinion has once more opened the door to confusion and misrepresentation by sanctioning products in interstate commerce labeled "Grape syrup flavored with fruit and thickened with pectin." The abuses and impositions that an unscrupulous manufacturer could inflict on the consuming public as a result of this decision are too apparent to merit further consideration.

The petitioner and the Government have joined together in this test case upon an honest difference of opinion as to meaning and effect of the "imitation" provision of the 1938 Act. The petitioner has marketed its products without deception; its good faith has not been challenged by the Government. The petitioner, moreover, is reluctant to see the years of toil on the part of the Con-

gress of the United States, the officials of the Food and Drug Administration, and attorneys, chemists, and manufacturers interested in the administration of the Food and Drug Laws for the benefit of the consuming public go for naught.

The petitioner is marketing a product which is labeled in conformity with 21 U.S.C. 343 (c), and which purports to be and is represented as imitation fruit preserves and purports to be nothing else and is represented as nothing else. (Finding of Fact 17, R. 23) Petitioner has refused the obvious invitation of the Court of Appeals to market its product under a fanciful label as suggested by the court because it firmly believes that the marketing of a product under such a label would lead only to confusion of the consuming public.

The position of the petitioner as to the language of the majority opinion is also shared by the Government. The concern of the Government that the language of the majority opinion above-quoted will prove to be a grave hindrance to the effective administration of the food provisions of the Federal Food, Drug, and Cosmetic Act of 1938 is apparent from the following language contained in the Government's Suggestion for Modification of Opinion:

> "It (the language of the majority opinion) may be misconstrued so as to support a contention which would place the consumer in a most disadvantageous position, and render null and void one of the most important and salutary provisions inserted in the Federal Food, Drug, and Cosmetic Act for the specific purpose of remedying a serious weakness in the predecessor Food and Drugs Act of 1906." (R. 74)

If, however, this Honorable Court should deny this writ, the petitioner would have no other alternative than to label and market its product in conformity with the opinion of the Court of Appeals for the Tenth Circuit.

Undoubtedly seizure by the Food and Drug Administration would immediately follow. Again the petitioner would be forced to defend its position at great expense. And again this Honorable Court, within the next few years, would be asked to hear the legal problems presented by this case. In the interval the interpretation and enforcement of the "imitation" section of the 1938 Act, 21 U.S.C. 343 (c), would stay in a chaotic condition. Litigation on this question would become widespread, and manufacturers, consumers, and the Government will all be in desperate need of the determination of this vital question of food law by this Honorable Court.

The unfortunate language of the majority opinion is, however, only one of several reasons for urging the granting of this writ. For 15 years last past, the petitioner has manufactured, labeled, and marketed its products in accordance with, not only his understanding of the meaning and intent of 21 U.S.C. 343 (c), but also the official interpretation of that section by the Federal Food and Drug Administration. The Food and Drug Administrator in two directives approved the theories advanced by petitioner and upon which petitioner relied in developing and marketing his product. In his Trade Correspondence No. 151 issued March 7, 1940, the Food and Drug Administrator stated that a manufacturer should produce an article conforming strictly to the standards for "Tomato Puree." "The only other alternative which in our opinion would insure a legal article (although not conforming to the standard) would be to label your present product '*Imitation* Tomato Puree'" (italics ours) Kleinfeld and Dunn, *Federal Food, Drug, and Cosmetic Act*, pages 627-628.

Likewise the Food and Drug Administrator stated in his Trade Correspondence issued April 17, 1941, that a mixture of strawberries, apple juice, and sugar, although substandard "will simulate the appearance and flavor of a

strawberry jam, and in our opinion, should be labeled as an imitation jam under section 403 (c) [343 (c)] of the Act." Kleinfeld and Dunn, *Federal Food, Drug, and Cosmetic Act,* page 712.

Prior to the enactment of the Federal Food, Drug, and Cosmetic Act of 1938, petitioner labeled and marked his product as "compound jam." At the request of the Denver Station of the Food and Drug Administration, after the passage of the 1938 Act, the petitioner changed his label from "compound jam" to "imitation jam." Subsequently, the petitioner has spent large sums of money in developing a market for his product based on labels and marketing practices suggested by the Government. Petitioner has conscientiously, in good faith, developed a wholesome, nutritious, and pure food product which sells in a competitive market at approximately one-half the cost of pure fruit preserves. The failure of this Honorable Court to review the decision of the Court of Appeals would result in great loss, not only in income, but capital expenditures made by Petitioner in compliance with the directives of the Food and Drug Administrator and his appointed officers.

As the trial judge stated in his opinion:

> "Claimant has sought to comply fully with every command of the statute. It is unnecessary to say that citizens have the right to rely upon the laws of the land as they are written and as reasonably interpreted. They should not be subjected to the hazards of administrative or judicial interpretation, extending restrictions of the law far beyond the plain meaning of the language used.
>
> "If the law-making branch of government desires this particular statute to be given the construction for which the government contends, it would be a simpler matter to insert in sub-section (c) an exception as to food for which definitions and standards have been established. No such appropriate lan-

guage indicating the legislative intention to make it impossible to imitate an article of food for which definitions and standards have been established, appears in sub-section (c)." (R. 27)

Not only is the question herein presented of utmost importance to the Food and Drug Administration, the consuming public, and manufacturers, including the petitioner who has been innocently trapped by a swift change of mind on the part of the Administrator, but it is a question which should be decided by this Honorable Court to chart the first clear course on the law of "imitation foods."

Although the Government brought this action in an attempt to clarify for manufacturers, consumers, and the Government itself, the "imitation" section, 21 U.S.C. 343 (c), of the 1938 Act, the Court of Appeals for the Tenth Circuit failed to discuss the "imitation" section in the majority opinion. The language of that section is clear and unambiguous, namely that a food is not misbranded if it is an imitation of another food and its label bears in type of uniform size and prominence, the word "imitation" and immediately thereafter the name of the food imitated. In the case before the court, the food was an imitation jam, its labels bearing the words "imitation grape jam," etc., conformed to the requirements of Section 343 (c) and the interpretations of that section by Trade Correspondence of the Food and Drug Administrator. The majority of the court has sought to repeal the imitation provision by judicial action without so much as a single mention of that section. This judicial repeal is attempted in the face of the clear intent of the Congress of the United States to sanction "imitation" foods in interstate commerce.

The majority opinion erred in refusing to consider the legislative intent of Section 343 (c). As stated above, one of the chief aims of Congress in enacting the new food and drug law was to eliminate the "distinctive name"

provision of the 1906 Act and eliminate the dangers that developed as a result of the Bred-Spred case. The "distinctive name" provision, 21 U.S.C. 10, was eliminated, but the imitation provision was retained as 21 U.S.C. 343 (*c*).

The Congress and the Food and Drug Administration made it clear that the 1938 Act sanctioned "imitation" foods in interstate commerce. Mr. Walter G. Campbell, Chief, Food and Drug Administration, Department of Agriculture, appearing before a subcommittee of the House Committee on Interstate and Foreign Commerce, considering Senate Bill No. 5 of the 74th Congress, expounded the official philosophy of his department on this question as follows:

> "Mr. Campbell: If there is one standard that can be effectively established as a common-law proposition it is that of preserves. It is a product that has been made in the home since time immemorial. One pound of fruit and a pound of sugar cooked to a definite consistency make preserves. That has been the common-law standard or the trade custom on the part of manufacturers throughout time.
>
> "But here is a product that looks like raspberry preserves. It tastes like raspberry preserves. It is a raspberry product. It contains only one-half of the fruit that is required under this common-law standard. *** But that product is not labeled as a preserve. It is labeled as bread spread. But, as a matter of actual commercial practice, purchasers of preserves, going into a retail store and calling for preserves, were handed this time out of mind, and it sold for almost the price that standard preserves sold for.***
>
> "There is fruit, sugar, and a pectinous material acquired from fruit, which is just a gelatinizing agent, that enables you to incorporate large quantities of water, all in lieu of the one-fourth amount of fruit deficient in that product as compared with the standard preserve. So that water and pectin have been substituted.***

"Mr. Chapman: What effect would the provision of Senate 5 have on the manufacture and sale of a product like that?

"Mr. Campbell: Senate 5 provides for standards. That product would be a substandard article and its marketing as a preserve would be proscribed.

"Mr. Chapman: That would be shown on the label?

"Mr. Campbell: It would have to be shown on the label just what it was, and enable the consumer to buy it for what it was.

There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for what it is, without deception, should be permitted the channels of commerce. *There can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying.* (Italics ours)

There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it." Dunn, *Federal Food, Drug and Cosmetic Act,* Pages 1238-1239.

This philosophy as expressed by Mr. Campbell was carried over in the final draft of the Federal Food, Drug, and Cosmetic Act as Section 343 (c). If the consumer knew what he was buying (and he was buying it at one-half the cost of pure fruit preserves) by reason of the label bearing the word "imitation," there can be no objection to an article with a deficiency in fruit.

United States Senator Royal S. Copeland of the State of New York in whose honor the Federal Food, Drug, and Cosmetic Act of 1938 is commonly referred to as the Copeland Act, rejects the theory advanced by the Government in this case by saying:

"It should be noted that the operation of this provision [Section 343 (g)] will in no way interfere with the marketing of any food which is wholesome

but *which does not meet the definition and standard*, or for which no definition and standard has been provided, but if an article is sold under a name for which a definition and standard has been provided, it must conform to the regulation." (Italics ours.) Dunn, *Federal Food, Drug, and Cosmetic Act*, pg. 246.

The intent of Congress on the "imitation" question is clear; the language of Section 343 (c) is not ambiguous. If Congress had intended to eliminate imitation foods, it had clear and unequivocal language in the drug sections of the act to use as a guide. 21 U.S.C. 352 (i) (2) provides in part as follows:

> "A drug or device shall be deemed to be misbranded . . . . if it is an imitation of another drug."

If Congress had intended to eliminate "imitation" food, it would have only had to borrow the words of Section 352 (i) (2) to achieve said result.

The Court of Appeals, in view of the clear intent of Congress and the obvious meaning of Section 343 (c), cannot amend by judicial act the Federal Food, Drug, and Cosmetic Act of 1938 to eliminate "imitation" foods from interstate commerce. Statutory amendment must be made by the Congress and not by the lower courts, and therefore this Honorable Court should grant this petition to prevent such a judicial amendment.

The Government has contended throughout this case that the case of *Federal Administrator v. Quaker Oats Company*, 318 U. S. 218, 87 Law. Ed. 724, is controlling authority to sustain its position. In the opinion of the petitioner, the Quaker Oats case is not of the slightest authority for the Goverment's position, and this Court should review the instant case to harness the Quaker Oats case to the realm of food law to which the Court originally had directed its attention.

Nowhere in the Quaker Oats case is the question of "imitation" discussed; the articles in question were not labeled "imitation." That case is authority for the proposition that once definitions and standards of identity have been promulgated, deviations will not be tolerated by the device of truthful labeling and nothing more. Nowhere in the opinion is the "imitation" provision [343 (c)] discussed. The Government is attempting to push its current but fluctuating interpretation of the Federal Food, Drug, and Cosmetic Act far beyond the intended scope of the Quaker Oats case.

The attempt of the Government to advance a strained and foreign interpretation of *Federal Administrator v. Quaker Oats Company, supra*, and similar cases *Libby, McNeill, & Libby v. United States*, 148 F. 2d 71 (C.A. 2), and *United States v. 716 Cases, More or Less, etc., Del Comida Brand Tomatoes*, 179 F. 2d 174 (C.A. 10) should be curbed by a review by this Court of the extremely important issues presented in this case.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 363

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62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO, AND PURE FOOD MANUFACTURING COMPANY,
Claimant, Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO, AND PURE FOOD MANUFACTURING COMPANY,
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BRIEF FOR THE PETITIONERS

OPINION BELOW

The majority opinion in the Court of Appeals (R. 57-63) is reported at 87 F. 2d 1014; the dissenting opinion in the Court of Appeals (R. 64-67) is reported at 87 F. 2d 1014, 1018. The opinion of the District Court (R. 25-27) is reported at 87 F. Supp. 735.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court was entered on June 27, 1950 (R. 67). Thereafter, on July 15, 1950, and within the time allowed therefore, a petition for rehearing (R. 67-74) was filed which was denied on July 22, 1950 (R. 78). On July 17, 1950, the respondent, the United States of America, filed a "Suggestion for Modification of Opinion," (R. 74-77) which was denied on July 22, 1950 (R. 78). A petition for a writ of certiorari was filed on October 16, 1950, and was granted November 27, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether "imitation jam" labeled and marketed as an "imitation" food in conformity with the provisions of Section 403 (c) of the Federal Food, Drug and Cosmetic Act is subject to seizure as a misbranded food under Section 403(g) if said "imitation jam" fails to meet the definition and standard of identity for pure fruit jam.

STATUTES INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, c. 675, 52 Stat. 1040, as amended June 24, 1948, c. 613, 62 Stat. 582, 21 U.S.C. 301, et seq. (hereinafter sometimes referred to as "the Act"), provides in pertinent part:

> Section 304 (21 U.S.C. 334). (a) Any article of food,***that is***misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce***shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found:***.
>
> Section 401 (21 U.S.C. 341). Whenever in the

judgment of the (Federal Security) Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulattions fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity,***.

Section 403 (21 U.S.C. 343). A food shall be deemed to be misbranded—

* * *

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

* * *

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, ***.

STATEMENT

For a period in excess of 15 years prior to the commencement of this libel action, the petitioner, Pure Food Manufacturing Company of Denver, Colorado, has manfactured "imitation jams" similar to the products herein seized, and prior to approximately 1935 had manufactured a "compound jam" of the same type and consistency as the "imitation jam" herein seized. At the request of the Denver Station of the Food and Drug Administration, the petitioner changed the label of the product from "compound jam" to "imitation jam", and since complying with such request, has continually manufactured and sold "imitation jam" in interstate commerce (R. 44-45).

A libel of information filed by the United States of America in the United States District Court for the Dis-

trict of New Mexico alleged that the food seized, namely, 62 cases, more or less, each containing six jars of jam, assorted flavors, net weight 5 lbs. 2 oz., was misbranded within the meaning of Section 403(g) when introduced and while in interstate commerce and while held for sale after shipment in interstate commerce, in that it purported to be and was represented as fruit jam, a food for which definitions and standards of identity had been prescribed pursuant to Section 401 of the Act. The libel of information further alleged that the food seized failed to conform to such definitions and standards of identity (R. 3-6).

The definitions and standards of identity for Fruit Preserves, 21 C.F.R. 29.0, pp. 81-84 (1949 ed.), provided that these foods shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients; and the soluble solids content of blackberry, strawberry and grape jam be not less than 68% and the apricot, peach and plum jam not less than 65% (R. 4-5).

The petitioner in his answer (R. 12-14) freely admitted that the jams under seizure contained less than 45% fruit as required by the definitions and standards for pure fruit jam. The defense of the petitioner is that the products were properly labeled "imitation jam" and hence are sanctioned in interstate commerce under the specific authority of Section 403(c) (R. 13-14).

Further, petitioner denied that the "imitation jam" under seizure purported to be or was represented to be pure fruit jam for which definitions and standards of identity had been promulgated.

At a pre-trial conference before the Honorable Carl A. Hatch, United States District Judge for the District of New Mexico, which developed into a trial without witnesses, it appeared that there was no significant dispute as to the facts. It was agreed, and the Trial Court found (R. 22-23) that the composition of the foods under seizure

was approximately as indicated on the label, which contained the following:

Net Wt. 5 Lbs. 2 Oz.

Delicious Brand
Imitation
Strawberry Jam

(or Grape, Apricot, Plum, Peach, Blackberry Jam)
made from 55% sugar, 25% fruit
20% pectin, citric acid, 1/10 of 1%
benzoate of soda
Packed by
The Pure Food Mfg. Co.
Denver, Colo.

The Government offered to prove that in one hotel in New Mexico, a patron of the restaurant was served "imitation jam" when the menu read "Jellies or Preserves served with above orders", and that the patron had neither the opportunity to examine the label nor to know he was consuming an imitation product (R. 41-42)

The Government further offered to prove that in some instances grocers in answer to requests from their customers for "jam" would furnish "imitation jam" (R. 43). Similarly respondent offered to prove that at some logging camps and ranches "imitation jam and jellies" have been served to employees, and that such employees ate and consumed such products without being informed that the same were "imitation" products and without an opportunity to see or observe the label of the container (R. 43).

The petitioner offered to prove by its president (1) that the article seized had been manufactured under sanitary conditions; (2) that it was wholesome, and had food value; (3) that the labels correctly set forth the ingredients and the proportions of each in the food; (4) that the petitioner has made "imitation jams" for a period in excess of 15 years; (5) that prior to that time the petitioner had manufactured what was known as a "com-

pound jam," which was in effect the same type food with the same consistency as the product here involved, but that at the request of the Denver Station of the Pure Food and Drug Administration, had changed the label to designate the product as "imitation jam;" (6) that more than 50% of its "imitation jam" is sold through retail food store outlets with the label displayed plainly on the container; (7) that the price of these "imitation jams" is 50% lower than that of pure fruit jams; and (8) that some consumers have written to the petitioner stating that they prefer the "imitation jam" to pure fruit jam (R. 44-46). The petitioner stated that it would have witnesses who would testify that they purchase its product from retail stores, and that by the label and the price they know they are not getting real fruit jam (R. 45). The Government agreed that the petitioner could obtain witnesses who would testify as indicated (R. 46-47).

Pursuant to agreement, the testimony specified above, which had been detailed by counsel for the Government and the petitioner, was considered by the Trial Court as evidence in this case (R. 47-48). The Trial Court made extensive findings of fact and conclusions of law (R. 20-25), and rendered a written opinion (R. 25-27), which is reported at 87F. Supp. 735. This written opinion declared that the article of food seized was an imitation of another food and it did not pretend to be anything else, that the article of food met every requirement of Section 403(c) of the Act [21 U.S.C. 343-(c)], and that Section 403 (c) even when read in connection with Section 403 (g), prevents "imitation food" properly labeled from being misbranded. Among other findings of fact, the Court found:

> (1) That the articles of food in question do not comply with the definition and standard of identity for fruit preserves and jams, and do not purport and are not represented to so comply with such standards. (Finding of Fact 15, R. 23)
>
> (2) That the articles of food seized purport to

be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else. (Finding of Fact 16, R. 23)

(3) That the articles of food seized are sold in interstate commerce without deception. (Finding of Fact 17, R. 23)

Judgment dismissing the libel of information was entered on October 20, 1949 (R. 28). On appeal to the Court of Appeals for the Tenth Circuit, the majority of the Court (R. 57-63) reversed the lower court on the ground that the jams under seizure purported to be and were represented to be fruit jams for which a definition and standard of identity had been promulgated, that they did not conform to the definition and standard of identity, and were therefore misbranded (R. 62-63). The majority opinion concluded, however, that "the manufacturer may market the product as syrup and fruit thickened with pectin, or syrup flavored with fruit and thickened with pectin" (R. 63).

The dissenting judge in his opinion (R. 64-67) would have affirmed the District Court on the ground that the food was labeled "imitation" in conformity with Section 403 (c), and to now seize the food as "misbranded" would render that section meaningless (R. 66). In addition, the dissenting judge stated that to sustain the Government's position, would mean to standardize price which was contrary to the intent of Congress.

SPECIFICATION OF ERRORS

The Court of Appeals erred:

(1) In holding that the seized articles of food were misbranded.

(2) In failing to give weight to the plain ordinary meaning of the word "imitation" on the labels of the seized articles.

(3) In failing to consider the intent of the Congress

of the United States to sanction "imitation" foods in interstate commerce.

(4) In disregarding the finding of the trial court that the articles of food seized purport to be and are represented as "imitation fruit preserves" and purport to be nothing else and are represented as nothing else.

(5) In failing to consider that for many years the official position of the Food and Drug Administration was that products similar to those seized in this case *must* be labeled and marketed as "imitation jam."

(6) In stating that the product seized could be marketed as "syrup and fruit thickened with pectin, or syrup flavored with fruit and thicked with pectin."

(7) In attempting to apply *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, *Libby, McNeill & Libby vs. United States*, 148 F. 2d 71 (C. A. 2), and *United States v. 716 Cases, More or Less, etc., "Del Comida" Brand Tomatoes*, 179 F. 2d 174 (C. A. 10) to the instant case.

(8) In enforcing the seizure provisions, Section 304 of the Act, against food products which were not misbranded "while held for sale after shipment in interstate commerce."

(9) In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

The article of food seized by the Government in this action, "imitation fruit jam" is an imitation food sanctioned under Section 403 (c) [21 U. S. C. 343 (c)]. Section 403 (c) of the Federal Food, Drug and Cosmetics Act is clear and unambiguous and reads as follows:

> "A food shall be deemed to be misbranded—If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated."

The specific language of Section 403 (e) leaves no doubt that "imitation jam" is sanctioned in the channels of interstate commerce, but in addition, reports and comments of legislative committees, senators, representatives, and officials of the Food and Drug Administration during the period prior to the passage of the Federal Food, Drug and Cosmetic Act further demonstrate the approval of "imitation" food products in interstate commerce. Subsequent to the enactment of the Act, the Food and Drug Administration took as its official position that foods which do not comply with a definition and standard of identity must be labeled and marketed as "imitation" foods. The Food and Drug Administrator in his Trade Correspondence No. 151 issued March 7, 1940, stated that a manufacturer should produce an article conforming strictly to the standards for "Tomato Puree." "The only other alternative which in our opinion (The Food and Drug Administration) would insure a legal article (although not conforming to the standard) would be to label your present product '*Imitation* Tomato Puree'." (Italics ours) Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, pages 627-628. Similarly in his Trade Correspondence No. 358 dated April 17, 1941, the Food and Drug Administrator recommended a food product be labeled "Imitation Strawberry Jam." Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 712.

In the light of the clear and unambiguous wording of Section 403 (e), the legislative history of the Act, and the interpretations of the Federal Food, Drug and Cosmetic Act by the Food and Drug Administration following the enactment of the Act in 1938, the attempted seizure by the Government must be dismissed, for if it is not dismissed, Section 403 (e) will be rendered meaningless.

If, however, this Honorable Court should render Section 403 (e) meaningless, nevertheless the Government has not maintained and cannot maintain its seizure under Section 403 (g). Section 403 (g) provides as follows:

> "A food shall be deemed to be misbranded—If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by Section 341, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, * * *."

The Trial Court having heard all the facts offered in evidence by both the Government and the Claimant, made the following finding of fact:

> "That the articles of food seized purport to be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else." (Finding of Fact 16, R. 23).

This finding of fact precludes the consideration by the Court of Section 403 (g) since the product under seizure does not purport to be nor is it represented to be jam for which a definition and standard of identity has been established.

The question before this Honorable Court is one of first impression. No court prior to the Trial Court in this action has been asked to interpret Section 403 (c) of the Federal Food, Drug and Cosmetic Act. The cases upon which the Government relies, *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, 81 Law Ed. 724, "*United States v. 306 cases . . . Sandford Tomato Catsup with Preservatives*, 55 F. Supp. 725 (E. D. N. Y.); *United States v. McGuire*, 64 F. 2d 485, (C. A. 2) cert. denied 290 U. S. 645; *United States vs. 2 bags Poppy Seeds*, 147 F. 2d 123 (C. A. 6); and *United States v. 30 Cases, more or less . . .* "*Leader Brand Strawberry Fruit Spread*," 93 F. Supp. 764, (S. D. Iowa, Central Division) are not in point as to the question presented to this Honorable Court. None of the above cases interpret the imitation section; none of them can be cited in support of the Government's position in this case. The Government in attempting to apply such cases to the seizure in this

action is attempting to expand the legal theories therein expounded far beyond the intent of the court, and to impose the dicta of these cases upon the "imitation" section of the Act, which section was not even mentioned in any of the four cases.

There is no contention by the Government that "imitation jam" is any less nutritious, any less wholesome, or has any less food value than pure fruit preserves. On the contrary, the record is singularly lacking in any reason how the public will be benefited by the proposed prohibition against "imitation" jam. If the Government should be successful in this abortive attempt, the public will be deprived of a wholesome food product having food value comparable to pure fruit jam but selling at approximately one-half the price of the standardized product. To afford maximum protection to the consuming public, the attempted seizure by the Government must be dismissed.

In addition, the Government has totally failed to lay a foundation for the seizure of the "imitation" jam as required by Section 304 (a) of the Act. Section 304 (a) provides that any article of food may be proceeded against if it is misbranded "when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce." There is not a single scrap of evidence introduced by the Government that the petitioner represented to the wholesaler, retailer, or ultimate purchaser that the "imitation" jam was the standardized jam. No invoices nor advertising material purported to represent the "imitation" as pure jam. Having failed to sustain the basis for seizure as required by Section 304 (a), the libel action of the Government must fail.

The Government has contended that the attempted seizure of "imitation jam" follows a consistent pattern of administration by the Food and Drug Administrator. An examination of the treatment of other food products

by the Administrator reveals a policy completely in contrast with the action attempted here. In bringing this action, the Government has refused to accept "imitation jam" as having a separate and distinct identity of its own. But the Government has sanctioned the manufacture and sale of sub-standard cream cheese by establishing standards for "neufchatel cheese," 21 *Code of Federal Regulations*, 19.520, CCH *Food, Drug and Cosmetic Law Reporter*, Section 2363. The only difference between cream cheese and "neufchatel cheese" is the increase in moisture and decrease in milk fat in the substandard food. Likewise, substandard cocoa coating has been recognized by the Government, and a definition and standard of identity for oleomargarine has long been in effect. Instead of a consistent policy, it is apparent that the Food and Drug Administrator has singled "imitation" jam for special prosecution and prohibition, contrary to the best interests of the consuming public.

ARGUMENT

I

THE FEDERAL FOOD, DRUG AND COSMETIC ACT IN UNMISTAKABLE LANGUAGE HAS SANCTIONED "IMITATION" JAM AND OTHER "IMITATION" FOOD PRODUCTS IN INTERSTATE COMMERCE.

The food product seized in this action is "imitation jam" as sanctioned in interstate commerce under Section 403 (c) of the Act. Section 403 (c) provides as follows:

> "A food shall be deemed misbranded—If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation,' and immediately thereafter, the name of the food imitated."

The food seized contained a label bearing in type of uniform size and prominence the word "imitation" and

immediately thereafter the name of the food imitated, namely "jam." The Trial Court found as one of its Conclusions of Law that "the labels on the seized articles conform in all respects with the requirements of Section 343 (c)" [Section 403 (c)] (Conclusions of Law, 3, R. 24). At no point in the evidence is there any intimation whatsoever that the Government questions the conformity of the food seized with the provisions of the imitation section. In fact, the petitioner changed its label from "compound jam" to the present label at the request, with the approval, and under the supervision of the Denver Station of the Food and Drug Administration. Nowhere is there any suggestion that the label does not conform with Section 403 (c).

The label of the seized food conforms to the requirements of Section 403 (c), what then is the status of the "imitation jam" shipped and marketed in interstate commerce? The statute plainly and without qualification states that such "imitation jam" shall not be deemed misbranded. To accept the Government's position that in spite of the compliance with Section 403 (c), the "imitation jam" is misbranded if it fails to conform to the definition and standard of identity of pure fruit jam, would be to render the "imitation" section meaningless. The word "imitation" in itself means substandard. Webster's *International Dictionary* defines imitation when used as an adjective as "simulating something superior." As Judge Pickett states in his dissenting opinion in the Court of Appeals for the Tenth Circuit, "No other word or combination of words in the English language could be used which would so well call to the attention of the purchasing public that the labeled food was not a standard product" R. 66, 183 F. 2d 1014, 1020).

If the Congress, as the Government here contends, had intended to eliminate imitation food from the avenues of interstate commerce, it had clear and unambiguous language in the drug section of the Act to use as a guide. Section 502 (i) (2) [21 U.S.C. 352 (i) (2)] provides in part as follows:

"A drug or device shall be deemed to be misbranded . . . if it is an imitation of another drug."

The failure of the Congress to use such phraseology in Section 403, and the clear and commonly understood meaning of Section 403 (c) as enacted by the Congress leaves the inescapable conclusion that the food seized is an "imitation food" sanctioned in interstate commerce.

II

THE LEGISLATIVE HISTORY OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT SUPPORTS THE PLAIN MEANING OF THE LANGUAGE OF SECTION 403 (c) AND DEMONSTRATES THE INTENT OF THE CONGRESS TO SANCTION "IMITATION JAMS" EVEN THOUGH DEFINITIONS AND STANDARDS OF IDENTITY HAVE BEEN PROMULGATED FOR PURE FRUIT JAM.

The language of Section 403 (c) is clear and free from ambiguity. It sanctions "imitation jam" in interstate commerce. The language of such section offers no qualification to such a result. The legislative history of the Act, and its interpretation by the Food and Drug Administration firmly support this position.

Parties to this action were most fortunate in having this case heard before the Honorable Carl A. Hatch, U. S. District Judge, for the District of New Mexico, since Judge Hatch, as a United States Senator from the State of New Mexico, was present in the Congress of the United States during the time of the extended debates and prior to the passage of the Federal Food and Drug Act of 1938. Judge Hatch, as a member of Congress during these times, was most familiar with the intent and purpose of the Act, and his opinion in the lower court carried out such intent by refusing to allow the Government to prevail in its interpretation of the Act which far transcended any intent in the minds of the members of Congress at the time of the passage of the Act.

To understand the intent of Congress in enacting Section 403 (c), it is necessary to go into the background of the passage of the 1938 Act. Although many failings of the Food and Drug Act of 1906 became apparent during the stress of an economic depression in 1932 and the following years, no decision was as strongly stressed by the Food and Drug Administration to show the need for revision of the 1906 Act as the so-called "*Bred Spred*" case. In *United States v. Ten Cases, more or less, "Bred Spred,"* 49 F. 2d 87 (C. A. 8), the Government seized a product sold in interstate commerce under the name "Bred Spred."

"Bred Spred" had the appearance of preserves, but it contained less than one-half the amount of fruit required by the trade standard recognized for such products. The price of "Bred Spred" was only slightly less than that of the product sold under the label of pure preserves.

Defense of the product rested on Section 8 of the Food and Drug Act of 1906, 21 U. S. C., 10, which provided in part as follows:

> "*Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> "First. In the case of mixtures of compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.
>
> "Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale."

The court held that "Bred Spred" since it did not contain any "poisonous" or "deleterious" ingredients was not misbranded because of the distinctive name provision of the statute above quoted.

Walter G. Campbell, Chief, Food and Drug Administration, Department of Agriculture, in an appearance before a subcommittee of the Senate Committee on Commerce on December 7, 1933, stated as follows:

> "The Bill S. 1944 (which with amendments not pertinent to this argument became the Food, Drug and Cosmetic Act of 1938) as framed eliminates that objectionable provision of the Act which makes it possible, by the employment of some fanciful designation like the term 'Bred Spred' to market a product under the legal assurance that it will be subject to none of the prohibitions of the Act as applied to all types of foods and drugs, with the single exception that it must contain no added poisonous ingredients." Dunn, *Federal Food, Drug and Cosmetic Act*, Page 1052.

It is important at this point to note that although as a result of the "Bred Spred" case, the distinctive name provision of the 1906 Act was eliminated, the imitation exception contained in 21 U. S. C. 10 was carried over to the 1938 Act as Section 403 (*e*).

Mr. Walter G. Campbell, appearing before a subcommittee of the House Committee on Interstate and Foregin Commerce considering Senate Bill 5 of the 74th Congress held the following discussion with members of that committee:

> "Mr. Campbell. If there is one standard that can be effectively established as a common-law proposition it is that of preserves. It is a product that has been made in the home since time immemorial. One pound of fruit and a pound of sugar cooked to a definite consisteney make preserves. That has been the

common-law standard or the trade custom on the part of manufacturers throughout time.

"But here is a product that looks like raspberry preserves. It tastes like raspberry preserves. It is a raspberry product. It contains only one-half of the fruit that is required under this common-law standard. * * * But that product is not labeled as a preserve. It is labeled as "Bred Spred." But, as a matter of actual commercial practice, purchasers of preserves, going into a retail store and calling for preserves, were handed this time out of mind, and it sold for almost the price that standard preserves sold for. * * *

"There is fruit, sugar, and a pectinous material acquired from fruit, which is just a gelatinizing agent, that enables you to incorporate large quantities of water, all in lieu of the one-fourth amount of fruit deficient in that product as compared with the standard preserve. So that water and pectin have been substituted. * * *

"Mr. Chapman: What effect would the provision of Senate 5 have on the manufacture and sale of a product like that?

"Mr. Campbell: Senate 5 provides for standards. That product would be a substandard article and its marketing as a preserve would be proscribed.

"Mr. Chapman: That would be shown on the label?

"Mr. Chapman: It would have to be shown on the label just what it was, and enable the *consumer to buy it* for what it was.

"There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for what it is, without deception, should be permitted the channels of commerce. *There can be no objection to that article with its deficiency of fruit*

if every consumer knows exactly what he is buying. (Italics ours)

"There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it." Dunn, *Federal Food, Drug and Cosmetic Act*, Page 1239.

It was pursuant to this philosophy of the 1938 Act as above expressed by Mr. Campbell that the imitation section of the 1906 Act was retained as Section 403 (c) of the 1938 Act. If the consumer knew what he was buying, i. e. the label bearing the word "imitation," there can be no objection to an article with a deficiency in fruit.

The Government has contended and has devoted much of its brief in the Court of Appeals to the proposition that Section 403 (g) must be read independently of Section 403 (c) of the 1938 Act, and that once standards of identity have been promulgated, Section 403 (c) has no further meaning or legal effect. Such a construction of the two subsections is completely foreign to the construction placed upon these two subsections by Congressional leaders at the time of the passage of the 1938 Act.

The Federal Food, Drug and Cosmetic Act of 1938 is commonly referred to as the Copeland Bill in honor of United States Senator Royal S. Copeland of the State of New York. Senator Copeland struck at the heart of this libel proceeding before this court when he said:

"It should be noted that the operation of this provision [Section 403 (g)] will in no way interfere with the marketing of any food which is wholesome but *which does not meet the definition and standard*, or for which no definition and standard has been provided, but if an article is sold under a name for which a definition and standard has been provided, it must conform to the regulation." (Italics ours) Dunn, *Federal Food, Drug and Cosmetic Act*, page 246.

By eliminating the distinctive name provision of the 1906 Act but retaining the imitation provision in Section

403 (c), Congress has provided for the manufacture and marketing in interstate commerce of "imitation jam," which although it does not meet the definition and standard of pure fruit jam, is wholesome and has great food value. To sustain the Court of Appeals in this action would only mean that by judicial action the Food and Drug Administration has obtained an amendment to the 1938 Act contrary to the intent of Congress.

As has been pointed out earlier in this brief, the petitioner, Pure Food Manufacturing Company, appears before this court with clean hands, its good faith, integrity, and honesty unchallenged by the Government. The Congress in passing the 1938 Act had no intention of disturbing an honest industrial enterprise such as the petitioner herein. Its purpose was "to provide a measure which will be an effective control for existing abuses (i. e. the "Bred Spred" case), and *at the same time, impose no limitation, embarrassment or hardship on honest industrial enterprise.*" (Italics supplied). Mr. Virgil Chapman, Congressman from Kentucky speaking before the House of Representatives, June 19, 1936. Dunn, *Federal Food, Drug and Cosmetic Act*, page 576.

It is submitted that Congress intended in no way to harass nor hinder an honest business enterprise such as the petitioner herein in the manufacture of "imitation jam" so long as the articles were labeled in accordance with Section 403 (c).

Up until 1945, the Federal Food and Drug Administrator had agreed with and followed the clear intention of Congress as evidenced by his Trade Correspondence No. 151 issued March 7, 1940, which is set forth in part as follows:

> "Correspondent raises question with respect to the status of so-called 'Strained Tomatoes Slightly Condensed.'
>
> "* * * we understand that you * * * desire to continue to pack this product which consists of whole

strained tomatoes very slightly concentrated but not brought to the degree of concentration of 'Tomato Puree.' In our opinion, such a product resembles 'Tomato Puree,' and by reason of this resemblance the product purports to be 'Tomato Puree.' The definitions and standards of identity so far promulgated for tomato products recognize an unconcentrated comminuted tomato product under the name of 'Tomato Juice' and recognize comminuted tomato products in differing degrees of concentration under the names 'Tomato Puree' and 'Tomato Paste,' respectively. There is no recognition of an article intermediate between an unconcentrated tomato product and 'Tomato Puree.' Consequently, it is our opinion that the slightly concentrated article you have in mind may have no legal status except as provided for under Section 403 (e) of the Food, Drug and Cosmetic Act, the provision dealing with imitations. We suggest, therefore, that in the manufacturing process you continue the concentration to at least 8.37 per cent salt-free tomato solids, producing an article conforming to the standards for 'Tomato Puree' which can be labeled as such. The only other alternative which in our opinion would insure a legal article would be to label your present product '*Imitation* Tomato Puree'." (Italics supplied) Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, pages 627-628.

Similarly the Food and Drug Administrator states in his Trade Correspondence No. 358 issued April 17, 1941, that a mixture of strawberries, apple juice and sugar, although substandard "will simulate the appearance and flavor of a strawberry jam and in our opinion, should be labeled as an imitation jam under Section 403 (e) of the Act." Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 712.

The language of Section 403 (e) is clear; the intent of Congress amply supports the plain ordinary meaning of this language; and the interpretation of this section,

even when read in conjunction with Section 403 (g), by the Food and Drug Administration, leaves but one conclusion: Section 403 (g) was not inserted in the 1938 Act to prohibit the manufacture and sale of substandard foods as long as they were properly labeled as "imitation" in conformity with Section 403 (c).

To the argument of the Government that the Trade Correspondence above sets forth represents day to day informal opinions to the trade, the attention of the Court is called to the official position of the Federal Security Administrator in *Land O'Lakes Creameries, Inc., et al v. McNutt, Federal Security Administrator*, 132 F. 2d 653 (C. A. 8). In that case, the Creamery Company challenged the definition and standard of identity for oleomargarine promulgated by the Federal Security Administrator. Among arguments advanced by the Creamery was the proposition that it was the duty of the Federal Security Administrator to require manufacturers of oleomargarine to label their product "imitation butter." The Federal Security Administrator in answering this argument again recognizes and expounds the Congressional intent that the word "imitation" prevents a substandard food product being passed off as the genuine or standard product. The Court in setting forth the Administrator's answer stated as follows:

> "The answer of the respondent (Government) is that oleomargine containing the optional ingredients referred to in the order, is not 'an imitation' of butter within the meaning of Section 403 (c); that the mere resemblance or similarity of one food to another is insufficient to make one an 'imitation' of the other; *and that what Section 403 (c) is directed at is preventing a spurious food being passed off as genuine. The* respondent also contends that, even if some oleomargarine conforming to the standard of identity might be sold under circumstances which might possibly make it an 'imitation' of butter under Section 403 (c), that fact would not vitiate the standard, *since the provisions of Section 401, relating to the establish-*

ment of standards of identity, and the provisions of Section 403 (c) requiring that imitations of foods be labeled as such, are not conflicting and are independent of each other.' Land O'Lakes Creameries, Inc., et al. v. McNutt, Federal Security Administrator, 132 F. (2d) 653, 658.

The Government states that if Congress so desired to limit the scope of Section 403 (g) to a consideration of the labeling, the words were at its command. We agree with the Government that words were at the command of Congress to so limit its scope and they are found in Section 403 (c) The meaning of 403 (c) is obvious; namely, that Congress intended to and did permit the manufacture and sale in interstate commerce of articles of food imitating standard products when labeled in accordance with law because such imitation products are acceptable when sold at lower prices than standardized products. Some customers through necessity, others through thrift; voluntarily choose to buy and use the cheaper product, the substitute, the imitation; such is a God-given right that ought not to be curtailed by legislative fiat. Thus by the simple words contained in Section 403 (c), which are understandable in any language, Congress gave that right to the consuming public. As stated by Mr. Campbell, there is no objection to the sale of skim milk if the buyer knows that it is skim milk when he is buying it.

We contend here that the 1938 Act is clear and unambiguous in sanctioning the manufacture and sale of "imitation jam" in interstate commerce. But if the 1938 Act is considered ambiguous, then this Honorable Court must consider the various committee reports and debates incident to the passage of the 1938 Act in Congress. *McLean v. United States*, 226 U. S. 374, 57 L. Ed. 260. In addition, the statements of Senator Copeland as the Senator charged with the responsibility for the passage of the Act in the United States Senate must be given great weight by this Court in interpreting Section 403 of the 1938 Act, *Wright v. Vinton Branch of Mountain Trust*

Bank of Roanoke, 300 U. S. 440, 81 L. Ed. 736. Likewise, this Court may consider the 1906 Act and the conditions existing in the 1930's which were urged by the Federal Food and Drug Administrators as reasons for the revision of the 1906 Law. *Hamilton v. Rathbone*, 175 U. S. 414, 44 L. Ed. 219, *in re McKenzie*, 142 F. 383. The Appellate Court cannot look independently at Section 403 (g) to determine the meaning of Section 403 (c). The Court must consider Section 403 (c) and (g) together in light of the 1906 law, the existing abuses of the 1906 law, the intent of Congress as exemplified by its debates, committee reports, statements by Senator Copeland and Congressman Chapman, and the plain ordinary meaning of the words and phrases used.

If there is any doubt in the court's mind that the plain language in Section 403 (c) does not sanction the manufacture and sale of "imitation jams," consideration of the construction factors set forth above will resolve any doubt.

Congress did intend, and by clear and unequivocal language so stated, that "imitation jams" such as the product seized in this action, are permitted and sanctioned in interstate commerce under Section 403 (c) of the Federal Food, Drug and Cosmetic Act of 1938.

III

THE TRIAL COURT FOUND AS A FINDING OF FACT THAT THE ARTICLES UNDER SEIZURE DID NOT PURPORT TO BE NOR WERE THEY REPRESENTED TO BE PURE FRUIT JAM FOR WHICH STANDARDS OF IDENTITY HAD BEEN ESTABLISHED UNDER SECTION 401 OF THE ACT.

Petitioner has no quarrel with the Government relative to the meaning of the word "purport" as used in Section 403 (g) of the 1938 Act. It should be given its usual and ordinary meaning, namely: "to convey, imply

or profess outwardly, as one's (especially a thing's) meaning, intention, or true character; to have the appearance, often serious appearance of being, intending, claiming, etc. (that which is implied or inferred)." Webster's *New International Dictionary, Second Edition.*

The trial court considered the articles seized in light of the definition above set forth. The Court first looked at the label which contained the word "imitation" in type of uniform size and prominence and immediately thereafter, the name of the food imitated, i. e. jam. Certainly the words "imitation jam" did not "convey, imply, or profess outwardly" that the article was jam. The seized article does not purport to be a standardized article; it is not sold, represented to be, nor purported to be an article of food for which a definition and standard of identity has been established. On the contrary the words "imitation jam" were red flags denoting to the consuming public that it was a product other than pure fruit jam. Webster's *International Dictionary* defines imitation when used as an adjective as "simulating something superior." Here the words "imitation jam" prominently displayed on the label in good faith told the consuming public that this article was not pure fruit jam; it did not purport to be, nor was it represented to be pure fruit jam.

The Court then considered the price for which the seized article was sold to the consuming public. The trial judge made a finding of fact that the imitation jams were substantially lower priced than fruit jams manufactured in accordance with the definition and standard of identity (Finding of Fact 13, R. 23). In this day and time, the consuming public, i.e., the American housewife, is acutely price conscious. A product would not appear to the housewife to be genuine fruit jam nor would it purport to be pure fruit jam when, in addition to the word "imitation" prominently displayed on the label, the article costs only half as much as pure fruit preserve. No housewife could be so misled.

The trial court then considered and made a finding

of fact that the majority of 5 lb. 2 ounce containers of imitation jam are sold and consumed by large families in lieu of butter or butter substitutes (Finding of Fact 14, R. 23). The Court, however, recognized in certain isolated instances that logging camps, restaurants, and other service institutions might serve imitation jam without disclosing the label (Findings of Facts 18 and 19, R. 23, 24).

The record in this case does not disclose any evidence that the claimant shipped and billed the seized food as pure fruit jam. The "imitation jam," so the trial court found, was sold in interstate commerce "without deception" (Finding of Fact 17, R 23). This honesty and fair dealing on the part of the claimant continued throughout the manufacture and sale of the "imitation jam" in interstate commerce. The Government was unable to offer any evidence whatsoever to show that the claimant by any act or omission represented that the imitation jam seized was the standardized pure fruit preserves.

At the conclusion of the trial, the court asked both sides to submit proposed findings of facts and conclusions of law. The Government in response to this request submitted, among others, the following proposed findings of fact and conclusions of law:

> "That the article of food involved in this case, and labeled in part 'imitation jam', was so presented and represented to many consumers that to them it purported to be the food 'jam', for which definitions and standards of identity have been duly promulgated.
>
> "That where consumers are supplied with a food that has the appearance and taste of, and is eaten for, a food for which there is a legal standard of identity, and such consumers have no opportunity to observe the label of the food consumed by them, such food purports to be to them the standardized food regardless of any declaration contained on the label as to the identity of the food consumed.
>
> "That a food purports to be a food for which

definitions and standards of identity have been established, where such food simulates the color, taste, and appearance of, and is used in place of and in substitution for, such standardized food." (R. 18-19)

The trial court, however, having carefully considered the evidence stipulated by the parties and offered into evidence, weighed the evidence carefully, rejected the proposed findings of fact set forth above, and made the following finding of fact:

> "That the articles of food seized purport to be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else." (Finding of fact 16, R. 23)

The trial court having carefully considered the evidence adduced and made a finding of fact that the articles seized do not purport to be nor are they represented to be pure fruit jam for which a definition and standard of identity has been established, such findings of fact is conclusive and binding on appeal. As this Honorable Court has said on numerous occasions:

> "It (the Trial Court) was exercising the functions of a jury and its findings are on the same plane as if embodied in a jury's special verdict . . . even if there was some basis for thinking the weight of the evidence was with the defendant as was strongly urged at our bar, it was not within the province of that court (Circuit Court of Appeals) to re-examine the evidence and reverse the judgment because of what it regarded as error of fact." *United States v. Jefferson Electric Manfacturing Company*, 291 U. S. 386, 407, 78 L. Ed. 859, 874. To the same effect, *United States v. Wells*, 283 U. S. 102, 120, 75 L. Ed. 867, 877.

Unless this Honorable Court shall see fit to reverse the finding of fact of the trial court and overthrow its long standing doctrine that findings of the trial court are conclusive in the reviewing court, Section 403 (g) has

no application in this case. The article of food seized is not represented to be and does not purport to be pure fruit jam, and therefore cannot be deemed to be misbranded under Section 343 (g).

IV

THE QUESTION PROPOUNDED BY THIS LIBEL PROCEEDING IS ONE OF FIRST IMPRESSION.

The Government throughout the trial and appeal of this action has contended that its position, here, namely, that at such time as a definition and standard of identity has been established, the imitation section, Section 403 (c) has no further force and effect and is therefore meaningless, is supported by binding legal precedences. Contrary to this contention by the Government, *No* court prior to the filing of the libel of information in this action has ever been asked to interpret the imitation provision of the 1938 Act.

The Government has cited in support of its contention the following cases:

Federal Security Administrator v. Quaker Oats Company, 318 U. S. 218, 87 L. Ed. 724;

United States v. 306 cases . . . Sandford Tomato Catsup with Preservatives, 55 F. Supp. 725 (E. D., N. Y.);

United States v. McGuire, 64 F. 2d 485 (C. A. 2), Cert. denied 290 U. S. 645;

United States v. 2 bags Poppy Seeds, 147 F. 2d 123 (C. A. 6);

United States v. 30 Cases, More or Less, Legder Brand Strawberry Fruit Spread, etc., 93 F. Supp. 764 (S. D. Iowa, Central Branch).

None of the cases cited by the Government in support of its position decides the issue in question here.

In *Federal Security Administrator v. Quaker Oats*

Company, supra, the articles seized were "Quaker Farina Wheat Cereal Enriched with Vitamin D" or "Quaker Farina Enriched by the Sunshine Vitamin." The Food and Drug Administrator had established standards for both "Farina" and "Enriched Farina." "Quaker Farina Wheat Cereal Enriched with Vitamin D" failed to conform to the standard for "Farina" by reason of its content of Vitamin D, which was not named by the standard, either as a required or an optional ingredient. The product did not conform to the standard for "Enriched Farina" since it did not contain the required Vitamin B, riboflavin, niacin, and iron.

The Quaker Oats Company argued that the standards of identity were unreasonable, and the Court of Appeals so held, but this Court on a writ of certiorari stated that it could not substitute its judgment for that of the administrator. This Court then went on to hold that since the products seized did not strictly conform to the standards of identity of either Farine or Enriched Farina, even though the labeling was truthful, the articles were misbranded. Nowhere in the *Quaker Oats* case is the question of "imitation" raised or discussed, the articles were not labeled "imitation" and whether or not if these foods had been labeled "imitation" the court would have reached the same conclusion is left unanswered. This Honorable Court did say, however:

"As we have seen, the legislative history of the statute manifests the purpose of Congress to substitute, for informative labeling, standards of identity of a food, sold under a common or usual name, so as to give consumers who purchase it under *that name* assurance that they will get what they may reasonably expect to receive." (Italics supplied) 318 U. S. 218, 232.

The language above quoted clearly demonstrates that this Court did not decide nor did it intend to foreclose the marketing of imitation foods under the authority of Section 403 (c).

In the second case cited by the Government, *United States v. * * * Sandford Tomato Catsup with Preservative, supra*, there seems to be no question that the article sold purported to be and was represented as tomato catsup. The manufacturer had added a preservative, which was not included in the standard promulgated by the administrator. It was not labeled imitation, but rather "tomato catsup with preservative added." The Court had no occasion to discuss Section 403 (c). The article under seizure, however, was in every particular the same as the standardized article, except for the fact that it contained a preservative not contained in the definition and standard of identity for tomato catsup, and consequently the Court held that it purported to be and was represented as tomato catsup, and since it did not comply with the standards of identity, it was misbranded. *United States v. 306 Cases * * * Sandford Tomato Catsup with Preservative*, 55 F. Supp. 725, 726, 727. This case was appealed by the claimant, Libby, McNeill & Libby, to the Circuit Court of Appeals, Second District, *Libby, McNeill & Libby v. United States*, 148 F. 2d 71 (C. A. 2) and affirmed. The Court of Appeals adds nothing to the opinion of the District Court insofar as the instant case is concerned. In both opinions, *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218 was taken as controlling. The question of imitation products is not discussed in either case.

In the third case, *United States v. McGuire, supra*, concerning the question of whether or not a certain ticket was a lottery ticket, other than defining the word "purporting," with which definition we do not disagree, that case is not in point in the instant case.

In the fourth case, *United States v. 2 bags * * * Poppy Seeds, supra*, the article that was seized was libeled upon the averment that the poppy seeds were adulterated. The facts therein are that white poppy seeds were artificially colored to resemble more costly seeds, because colored poppy seeds, although not possessing any greater food value than the white poppy seeds, were more costly. The

court found this action to be a deception of the consuming public. Section 403 (c) was not at issue in that case, and therefore, that case has no application in the instant case.

The latest litigation of the Government in the food and drug field in direct line with *Federal Security Administrator v. Quaker Oats Company, supra*, is *United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread, etc.*, 93 F. Supp. 764 (S. D. Iowa, Central Division). In this case the Government seized two pound jars of "Leader Brand Strawberry Fruit Spread." The evidence showed that the claimant therein had at times invoiced these articles as "Leader Brand Strawberry Pres." that at least one wholesale grocer invoiced the food seized as preserves, and that as late as March 20, 1950, certain "sales dodgers" distributed to the retail trade by at least one wholesale grocer to the Leader Brand products as "fruit jam spread". In view of this evidence, the court concluded "that the showing made does establish by a preponderance of the evidence that there was a substantial amount of actual representation of the seized items to be jams and preserves." 93 F. Supp. 764, 76.

The court having found that the food product seized was represented to be pure fruit jam, and the claimant having admitted in its answer that the articles did not conform to the definitions and standards of identity for pure fruit jam, the court found the articles seized were misbranded within the meaning of Section 403 (g) of the Act.

In addition, the court found that while both standard jams and "Leader Brand" products contain 32 per cent water, no water is introduced from the tap in the manufacture of standard jam; in the manufacture of Leader Brand Products 22.8 per cent of the water remaining in the products comes from the tap. The court found that the addition of tap water and solids of sugar derived from corn syrup and sugars increased the bulk and weight of the Leader Brand Products and made these articles appear

to the ordinary consumer to be better and of greater value than they are. The court concluded that the articles of food were adulterated within the meaning of Section 402 (b) (4).

United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread, 93 Supp. 764, is but a continuation of the legal doctrine set forth in *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, and *Libby, McNeill, and Libby v. United States*, 148 F. 2d 71. All three of these cases are authority for the proposition that once definitions and standards of identity have been promulgated, articles of food which purport to be or are represented to be a standardized food must strictly conform to these definitions and standards. A deviation from such standard, no matter how slight the variation may be and even though the variation is disclosed by truthful labeling, the food shall be deemed to be misbranded under Section 403 (g).

Petitioner has no quarrel with the principles of law expounded in the three cases mentioned in the above paragraph. Not only are the decisions based on the plain meaning of the Federal Food, Drug and Cosmetic Act, but also they are in accord with the intent of Congress as universally expressed in the Committee reports and debates in Congress prior to the passage of the Act.

Petitioner contends that the three cases are no authority for and have no application to the question presented in the instant case. In each of the three cases, the food was represented by claimants and wholesalers alike as standardized food. In *United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread, etc., supra*, deception on the public was practiced by the manufacturer, i. e., tap water, supar and corn syrup were added thereto and packed so as to increase their bulk and weight and make them appear better and of greater value than they were.

In the seizure before this Court there was no repre-

sentation that the "imitation jam" was the standardized article; the "imitation jam" did not purport to be pure fruit jam (Finding of Fact 16, R. 23). In this action the Court also found that "the articles of food seized are sold in interstate commerce *without deception.*" (Italics supplied) (Finding of Fact 17, R. 23). The sole question before this Court for determination is whether or not the "imitation" provision of the Act means what it says, namely, that imitation food products may be marketed in interstate commerce if such food products are marketed in accordance with the provisions of Section 403 (c), or whether, contrary to the plain meaning of the Act, the intent of Congress clearly and unmistakingly expressed, and the administrative interpretations of the "imitation" section by the Food and Drug Administration, the interstate shipment of "imitation" food products will be prohibited. It is submitted that *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, *Libby, McNeill and Libby v. United States*, 148 F. 2d 71 and *United States v. 30 Cases, More Or Less, Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764, are not authority for such a prohibition.

Prior to the decision in *Federal Security Administrator v. Quaker Oats Company, supra*, the official interpretation of the "imitation" section of the Act was clear and in conformity with the intent of Congress which was at that time fresh in the mind of the Federal Food and Drug Administrator. In two directives, the Food and Drug Administrator approved the theories advanced by petitioner in this case, and upon which the petitioner, and hundreds of other manufacturers of "imitation jam" relied in developing and marketing their products. In his Trade Correspondence No. 151 issued March 7, 1940, the Food and Drug Administrator stated that if a product did not conform strictly to the definition and standard of identity of tomato puree, "the only other alternative which in our opinion (the Government) would insure a legal article (although not conforming to the standard) would be to label

your present product '*Imitation Tomato Puree*'." (Italics supplied) Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, pages 627-628.

Similarly on April 17, 1941, the Food and Drug Administrator, stated in his Trade Correspondence No. 358, a mixture of strawberries, apple juice and sugar although substandard "will simulate the appearance and flavor of a strawberry jam, and in our opinion, should be labeled as an imitation jam under Section 403 (c) of the Act." Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 712.

With the advent of the *Quaker Oats* decision, the Food and Drug Administrator abruptly reversed his position as to "imitation" foods. Immediately the Administrator took the position that the *Quaker Oats* case prohibited the interstate shipment of "imitation" food. Such a reversal of position on the basis of the *Quaker Oats* case was not justified under the facts, the decision, or even the dictum of the *Quaker Oats* case. On April 14, 1945, while in effect reversing his rulings in Trade Correspondence Nos. 151 and 358, the Food and Drug Administrator stated as follows:

> "NOTICE TO IMPORTERS OF PINEAPPLE PRODUCTS
>
> Pineapple and sugar mixtures purporting to be pineapple preserves, but not complying with the standard, are illegal under any form of labeling, even if labeled as imitation pineapple preserve, and will be denied entry into country.
>
> TC—427—April 14, 1945
>
> "In 1943 a number of importers of pineapple products were advised that various pineapple and sugar mixtures purporting to be pineapple preserves, but which contained somewhat less soluble solids than the 68 per cent required by the standard of identity

for pineapple preserves promulgated under the Food, Drug and Cosmetic Act should either be made to conform to that standard by increasing the concentration of soluble solids or should be labeled as imitation pineapple preserve.

"Further consideration of the matter in the light of recent court decisions has led us to conclude that products of this type are illegal under any form of labeling. It is not difficult to manufacture pineapple and sugar mixtures so as to contain not less than 68 per cent soluble solids and to otherwise conform to the standard for pineapple preserve in every particular.

"On and after May 15, 1945, shipments of such illegal articles will be denied entry. Previously issued administrative opinions which are not in accord with this notice are hereby rescinded." Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 746.

Although the Food and Drug Administrator has abruptly reversed his field in prohibiting the interstate shipping and marketing of "imitation" food products, such reversal was based on an erroneous interpretation of *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, which as has been pointed out previously, was not concerned in any manner with Section 403 (c), the imitation provision of the Act.

Therefore, this Honorable Court must consider the question presented to it by this case, as a question of first impression to be decided on the basis of (1) the plain meaning of Section 403 (c) and (2) the Congressional intent as revealed in the Committee hearing and reports and in the debates on the Act in Congress.

The cases upon which the Government is relying to sustain its position are not in point with the instant case, and this Honorable Court, in reversing the Court of Appeals for the Tenth Circuit, will prevent the opinion in the *Quaker Oats* case from being strained by administrative interpretation far, far beyond the intent of this Court.

V

THE DECISION OF THE TRIAL COURT DOES EFFECTUATE MAXIMUM PROTECTION FOR THE CONSUMING PUBLIC.

The Government has ignored the welfare and protection of the consuming public in attempting to prohibit the interstate shipment and marketing of "imitation" jam. The Government is in effect trying to drive off the market a product competitive to pure fruit preserves. The Government has not contended that "imitation jam" is not wholesome, does not have food value, and is not nutritious. The Government did not even introduce evidence to indicate that "imitation jam" had any less food value, was any less nutritious, or any less wholesome than pure fruit preserves.

The Government merely introduced evidence that at a certain hotel in New Mexico, a patron of the restaurant was served "imitation jam" when the menu read "Jellies or Preserves served with above orders," and that the patron neither had the opportunity to examine the label nor to know he was consuming an imitation product. Further, the Government offered to prove that imitation jellies and preserves have been served at some ranches and logging camps to employees thereof and that such employees ate and consumed such products without being informed that the same were imitation products and without an opportunity to see or observe the label of the container.

Nowhere did the Government prove or offer to introduce evidence that as a result of the above transactions, the patron of the restaurant, or the ranch or logging camp employees were deceived or that their health and pocketbooks were not adequately protected. The record does not show one complaint as a result of such service and consumption of "imitation jam." The record is completely silent as to the way in which the consuming public would, could, or should be protected by the seizure of the "imitation jam" in this action.

The "imitation jam" industry of the United States is in the same relation to the pure fruit jam industry as the oleomargarine producer is to the butter manufacturer. If the Government had been able to show a real hardship to the consuming public as a result of the sale of "imitation jam," perhaps the Food and Drug Administrator could ask the Congress to pass a law that "imitation jam" be packed in triangular jars or that restaurants, ranches, and logging camps be required to publicly display signs that they are serving "imitation jam." In the meantime the consuming public has not complained since they are buying a product with comparable food value at one-half the cost.

The Government has also advanced an argument that to petitioner seems to display a naive approach to the manufacture and marketing of food products. In attempting to dramatize the catastrophes that might befall the consuming public if the decision of the court was not reversed, the Government states at page 17 of its brief in the Court of Appeals:

> "If the Section [Section 403 (g)] can be circumvented by the *simple* device of using the word 'imitation' on the label of a product . . . there has been an effective extraction of the section's teeth." (Italics ours)

How completely unrealistic are those words "simple device." In this day and time when advertising emphasizes the highest standard of purity and quality of ingredients, is a manufacturer going to attach the word "imitation" to his product and market it at a substantially lower price? Certainly not, at least not without a great deal of consideration of the connotations of the word "imitation" in any food product. It cannot be reasonably expected that an opinion of this Court will bring on a wave of "imitation" products injuring the public in some strange manner that the Government in this case failed to prove or even mention.

In commenting on the grave need for protecting the public, the Government throughout this entire condemnation proceeding, has overlooked and ignored a most important part of public policy. The purpose of the Federal Food, Drug and Cosmetic Act is "to provide a measure which will be an effective control for existing abuses, and at the same time, impose no limitation, embarrassment, or hardship on honest industrial enterprise." Dunn, *Federal Food, Drug and Cosmetic Act*, page 576. The petitioner in this action is honestly and in complete good faith manufacturing and selling in interstate commerce a wholesome food product sanctioned by directives of the Food and Drug Administrator himself. Trade Correspondence No. 151 issued March 7, 1950, and Trade Correspondence No. 358 issued April 17, 1941. Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, pages 627, 628, 712.

It is a fundamental principle of our form of government, completely ignored by the Government in this action, that all laws must be reasonably interpreted so that those who come under their jurisdiction may know the mandates of Congress. The trial judge in this case, who was at the time of the passage of this act a distinguished member of the United States Senate and who displayed a complete and clear knowledge of the Congressional intent of this act, did not ignore this fundamental principle of public policy. We can do no better than to quote from his clear and concise opinion as follows:

> "Any person reading sub-section *e* [403 (e)] and even in connection with sub-section g [403 (g)] would reasonably come to the conclusion that if the imitation of another food has a label bearing, in type of uniform size and prominence, the word 'imitation' and immediately thereafter the name of the food imitated, such food so labeled would not be misbranded. Acting under such apparent, reasonable interpretation of the language of sub-section (e), the manufacturer has made and sold this article for years without any intent to violate the law. Claimant has sought to comply fully

with every command of the statute. It is unnecessary to say that citizens have the right to rely upon the laws of the land as they are written and as reasonably interpreted. They should not be subjected to the hazards of administrative or judicial interpretation, extending restrictions of the law far beyond the plain meaning of the language used.

"If the law-making branch of Government desires this particular statute to be given the construction for which the Government contends, it would be a simpler matter to insert in sub-section (c) an exception as to food for which definitions and standards have been established. No such appropriate language indicating the legislative intention to make it impossible to imitation an article of food for which definitions and standards have been established, appears in sub-section (c).

"If sub-section (c) is to be amended to prevent imitation of an article of food for which definitions and standards have been established, the same should be done by legislative action in clear language easily read and understood by citizens, such as the claimant in this action, who seeks to know the mandates of the statute in order that they may comply with the same. Such an extension of language should never be made by administrative action or judicial construction." 87 F. Supp. 735-737. (R.-26-27)

Similarly the dissenting Judge in the Court of Appeals expressed the same legal theory in these words:

"It is clear to me that the very purpose of Section 343 (c) [Section 403 (c)] is to permit on the market a wholesome and nutritious food which is within the means of a great mass of our people who are unable to purchase the standard products. At the time the bill was being considered by Congress, the Food and Drug Administration so recognized the necessity for such products. Senator Copeland who

sponsored the bill recognized the right to sell substandard foods, said, 'It should be noted that the operation of this provision will in no way interfere with the marketing of any food which is wholesome but which does not meet the definition and standard, or for which no definition and standard has been provided.' Dunn, *Federal Food, Drug and Cosmetic Act*, page 246. The administrator construed the Act to permit a substandard article to be labeled as an 'imitation' at least as late as 1941 and took no different view until 1945, Kleinfeld & Dunn, *Federal Food, Drug and Cosmetic Act* 1938-1949, page 627, 712. Until this action was brought the label on products of the claimant was never questioned by the Administrator; in fact it is the label suggested by him. He does not question its sufficiency now. It was designed to meet the requirements of 343 (c) [Section 403 (c)] by showing that the product did not meet the standards but was an imitation. No other word or combination of words in the English language could be used which would so well call to the attention of the purchasing public the fact that the labeled food was not a standard product. It is a word of common usage and understanding. Webster defines it to mean: 'the form of something regarded as a pattern or model * * * an artificial likeness * * * simulating something superior esp. something more costly.' Necessarily any imitation would have the appearance of that which it imitates. In this case the jam did look and taste like that which meets the prescribed standard but it is labeled 'imitation' in the manner required by the statute. If the section is not given this construction it is meaningless." 183 F. 2d 1014, 1019, 1020. (R. 65-66)

VI

THE "IMITATION JAM" SEIZED IN THIS ACTION WAS NOT MISBRANDED "WHEN INTRODUCED INTO OR WHILE IN INTERSTATE COMMERCE OR WHILE HELD FOR SALE (WHETHER OR NOT THE FIRST SALE) AFTER SHIPMENT IN

INTERSTATE COMMERCE" AND IS NOT SUBJECT TO SEIZURE UNDER SECTION 304 (a) OF THE ACT.

The grounds for seizure of adulterated and misbranded food under the *Federal Food, Drug and Cosmetic Act* are contained in Section 304 (a) which provides in part as follows:

> "Any article of food, * * * that is * * * misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found, * * *."

The libel of information filed by the Government alleged that the food in question was "misbranded when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce." (R. 4). The petitioner in its answer denied this allegation (R-13). The basis for the Government contention that the "imitation jam" is misbranded is Section 403 (g) which provides as follows:

> "A food shall be deemed misbranded—If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring and coloring) present in such food."

As petitioner has heretofore stated, this contention of the Government was shattered by the Trial Court when it made its finding of fact that "the articles of food seized

purport to be and are represented as imitation fruit preserves and purport to be nothing else and are represented as nothing else (Finding of Fact 16, R. 23).

The evidence offered by the Government at the trial of the case consisted of offers of proof that the "imitation jam" was *served* to a patron of a New Mexico restaurant when the menu read "Jellies or Preserves served with above orders" (R. 41-42), that some consumers were *furnished* "imitation jam" by grocers when receiving telephone orders for jam (R. 43), and that at some logging camps and ranches "imitation jam and jellies" had been *served* to employees, and that such employees ate and consumed such products without being informed that the same were "imitation" products and without an opportunity to see or observe the label of the container (R. 43).

This was the extent of the evidence offered by the Government. The record does not disclose one shred of evidence that the "imitation" jam was actually sold as the standardized jam. No evidence was introduced to show that the jam under seizure was sold to wholesalers as "jam." There is no evidence, such as was introduced in *United States v. 30 Cases, More or Less, Leader Brand Strawberry Fruit Spread*, 93 F. Supp. 764 (S. D. Iowa, Central Division) that the food produced was invoiced in interstate commerce to the wholesaler as "jam." As the Trial Court found, there was no deception in the shipment in interstate commerce and the marketing of the product. Therefore, the seizure in the instant case cannot be sustained on the grounds that the food was misbranded "when introduced into or while in interstate commerce."

The only remaining ground to sustain the seizure herein contemplated is that the food was misbranded "while held for sale (whether or not the first sale) after shipment in interstate commerce." In the preceding paragraph petitioner maintained there was no representation that the imitation jam was in fact the standardized "jam." Similarly, since to the wholesaler the imitation jam was not represented to be nor did it purport to be standard-

ized jam, the next marketing relationship to scrutinize is the wholesaler-retailer relationship. Here also there is a total lack of evidence to indicate that the "imitation jam" "while held for sale" was represented to the retailer as standardized jam. There are no invoices showing billing to the retailer as "jam," there are no "sales dodgers" nor similar advertising material representing the product as jam.

Similarly there is no evidence that in the sale to the consuming public, the "imitation jam" was advertised as "Delicious Grape Jam," or that the retailer in invoicing the product to the logging camps and ranches invoiced the seized food as standardized jam.

Beginning with the shipment of the manufacturer in interstate commerce to the wholesaler, in the sale by the wholesaler to the retailer, and in the sale by the retailer to the ultimate purchaser, there is no evidence introduced by the Government that the "imitation jam" was misbranded "when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce." The Government having failed to introduce such evidence as required by Section 304 (a), the seizure attempted by the Government must be dismissed.

In this connection, the Court's attention is called to the fact that the trial court requested the Government and the Petitioner to file their requested Findings of Fact and Conclusions of Law. The Government's requested Findings of Fact and Conclusions of Law are set forth at pages 18 to 20 of the Record. The Government failed completely even to request a finding of the trial court that the food seized was misbranded. "When introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce" as required by Section 304 (a), and the Government having further failed to introduce any evidence to sustain such a finding by the trial court, this seizure action cannot be maintained.

VII

THE FOOD AND DRUG ADMINISTRATION HAS BEEN AND IS STILL UNABLE TO CHART A CONSISTENT COURSE OF ACTION AS TO THE IDENTITY OF FOOD PRODUCTS.

The petitioner has shown that up until April 14, 1945 and the issuance of the Administrator's Trade Correspondence No. 427, Kleinfeld and Dunn, *Federal Food, Drug and Cosmetic Act*, page 746, the continuing policy of the Food and Drug Administration has been to sanction in interstate commerce substandard food if such substandard food was labeled "imitation" in conformity with Section 403 (c). The Government has laid great stress on the fact that since April 14, 1945, the Food and Drug Administration has reversed its former position and prohibited the shipment and marketing in interstate commerce of "imitation" food once a definition and standard of identity for the food so imitated has been established.

The Government contends that the word "imitation" on the label of the food product, and a list of the contents of the food (informative labeling) is not sufficient safeguard for the American people. The Food and Drug Administrator has refused to accept "imitation jam" as having a separate and distinct identity of its own established by Congressional Act under Section 403 (c), and when pectin replaces fruit in the standard food product, the Administrator proceeds against the food even though it is "imitation jam" labeled and marketed as such.

Petitioner contends that the action of the Government in proceeding against "imitation jam" in this action and by refusing to recognize the peculiar identity of this food product is adopting a policy inconsistent with its policy toward several other food products. Enumeration of several of these products will suffice on this point.

The Food and Drug Administrator has established a definition and standard of identity for "Cream Cheese," 21 *Code of Federal Regulations*, Section 19.515, CCH

Food, Drug and Cosmetic Law Reporter, Section 2362. Likewise a definition and standard of identity has been established for "neufchatel cheese," 21 *Code of Federal Regulations*, 19.520, CCH *Food, Drug and Cosmetic Law Reporter*, Section 2363. Neufchatel cheese differs from cream cheese only in that neufchatel cheese contains less milk fat and more moisture, not less than 20 per cent milk fat as against a requirement of at least 33 per cent for cream cheese.

Neufchatel cheese is therefore what the Government refers to as an economic adulteration; a less costly ingredient, water, is substituted for a portion of the milk fat used in cream cheese. In imitation jam, pectin solution is substituted for fruit. Up to this point the analogy between neufchatel cheese and imitation jam is similar. But the action by the Government against the two foods is radically different. The Administrator has dignified neufchatel cheese by recognizing its distinct identity and by establishing a definition and standard of identity for the product. Meanwhile the Administrator proceeds against "imitation jam" as a misbranded food.

Except to the food specialist completely familiar with cheese products, the physical appearance, taste, odor, etc., of cream cheese and neufchatel cheese are indistinguishable. If the patron of that certain New Mexico restaurant were to order "cream cheese," what protection would he have that he was not being served neufchatel cheese? Similarly, what is to prevent the service of neufchatel cheese in lieu of cream cheese to the employees of logging camps and ranches in New Mexico? To the petitioner, the situation is identical with reference to "imitation" jam and yet the Government attempts to seize "imitation jam" and yet dignifies substandard cream cheese with an identity of its own, neufchatel cheese.

Which course of action by the Government will result in greater protection to the consuming public? Most certainly the word "imitation" whether applied to cream cheese or jam would be a much greater safeguard and assurance that the product would be honestly marketed and

the public safeguarded than a word "nonfat-dried" which would neither connote inferiority, substitution, nor economic adulteration to the buying public. If protection of the public was the end result desired, the Administrator would have done well to sanction the product as "imitation cream cheese."

Similarly, standards of identity have been established for "sweet chocolate and vegetable fat (other than cocoa fat) coating, 21 *Code of Federal Regulations*, 14.11, CCH *Food, Drug, Cosmetic Law Reporter*, Section 2388, and sweet cocoa and vegetable fat (other than cocoa fat) coating, 21 *Code of Federal Regulations* 14.12, CCH *Food, Drug, Cosmetic Law Reporter*, Section 2389.

These food products differ from all other cocoa coatings in that foreign cheaper fats are allowed to be substituted for more expensive cocoa fats. The cheaper substitute product is similar in appearance, taste, odor, etc., to the more expensive product and is indistinguishable to the ordinary purchasing public, and yet the Food and Drug Administrator dignifies the substandard products with definitions and standards of identity of their own. Why then has the Government sifted "imitation jam" out for special vengeance?

A third substitute or substandard food product that is recognized as having an identity of its own is oleomargarine. Oleomargerine as a substitute for natural butter has been recognized as having an identity of its own by the Circuit Court of Appeals for the Eighth Circuit in *Land O'Lakes Creameries, Inc. v. Paul V. McNutt, Federal Security Administration, et al.*, 132 F. 2d 653 (C.A.8). The similarity between oleomargarine and butter are too well known to bear repetition here. Suffice is it to say that if it were not for the elaborate safeguards placed around oleomargerine by the butter industry, oleomargerine could have been easily marketed as "imitation butter."

The above examples point up the inconsistency of the Food and Drug Administration in dealing with the question of substandard food products. There is no sincerity in

the instant case why there is a compelling need to safeguard the public by the seizure of "imitation jars," while on the other hand the Government establishes definitions and standards of identity for substandard cream cheese, cocoa coating, and butter.

The compelling need to safeguard the public in the sale of substandard, but wholesome and nutritious food product is completely accomplished by the use of "imitation" labeling as contemplated by the Congress under Section 403 (e).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 363

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62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO, AND PURE FOOD MANUFACTURING COMPANY,

Claimants, Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ASSORTED FLAVORS, NET WT. 5 LBS. 2 OZ., SHIPPED BY THE PURE FOOD MANUFACTURING CO., DENVER, COLORADO, AND PURE FOOD MANUFACTURING COMPANY,

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Statement

The Government asks this Court to hold, in effect, that once definitions and standards of identity have been established for a food product, any product which resembles the standardized article will be outlawed, regardless of its label, its price, the manner of marketing it, or its value as a food. As we shall point out, there are strong indications that

variations from the norm of unstandardized foods are also regarded as illegal.

We have noted in our brief that Claimant first marketed this product as a "compound" and that, at the request of the Denver Station of the Food and Drug Administration, its name was changed to Imitation Jam. Claimant manufactures no other product.

Now the Government asks that this Court destroy the Claimant's sole product, his markets, his good will—all developed over a period of many years. Even if Claimant were able to manufacture and develop new marketing channels for pure jam, such a change-over would involve an expense and loss of business and income to such an extent that Claimant would suffer literal disaster—as, we think would many other small businesses under such compulsion.

The suggestion of the Government that the proper remedy for the Claimant is to apply to the Administrator for an additional definition and standard of identity for low priced jam (Br. p. 70) is hardly reassuring. We suspect that this suggestion was made with but one cardinal thought—to temper the harshness of the result sought by the Government in this proceeding.

The decision urged by the Government would have other ramifications of the most serious import. It would, for example, standardize the price of food products. As the dissenting judge in the Court of Appeals pointed out in his opinion:

> "A large portion of the food consumed today comes within the provisions of the Act. To sustain the government's position here gives the Federal Security Administrator absolute control over the ingredients of all such foods. He will have the right to standardize the sauce, which will mean virtually a standardization of the price. It will remove from the market a nutritious and wholesome food which sells for approx-

imately one-half the price of the standard product. The purchasing public, regardless of their ability to pay, will be forced to purchase the same quality of food. I cannot believe Congress had any such intent. I would affirm the trial court." (R. 67)

The practical effect will be to extend government control in the food manufacturing field far beyond any level which was suggested to Congress when the Act of 1938 was under consideration, as we shall hereafter show. We think that it can be shown that the result sought can properly be achieved only by legislation, not in a court proceeding.

Since a decision favorable to the Government would destroy Claimant's business, outlaw a wholesome food product which is used by many families in lieu of butter and butter substitutes, and would in effect standardize prices at a high level, we take this opportunity, in reply to the Government's brief, to point out and emphasize certain aspects of the Government's position which, in our opinion, are untenable.

ARGUMENT

I

The Government Seeks, Without the Requisite Statutory Authority, to Bar From Interstate Commerce Imitation and Substitute Foods Generally, in Both Standardized and Unstandardized Categories.

Although it is not so stated in the brief, there are indications that the ultimate aim of the Government is to impose a comprehensive ban upon the interstate marketing of imitation or substitute foods. This aim is apparently not limited to the outlawing of foods which fail to conform, in one detail or another, to the applicable standard of identity. It extends also to foods which do not conform to the "customary" standard or norm.

There can be no question of the purpose of the government in this case itself: it is to obtain a decision that claimant's imitation jam is an illegal product, regardless of the method in which it is marketed. The offers of proof that such foods are, in some instances, sold to consumers *as* the standardized food were evidently made primarily to illustrate the general problem created by the marketing of substandard products of this nature, with no implication that such products, if honestly sold, are not misbranded as here charged. The government's position would, of course, be the same regardless of the type of labeling carried by this product or any other article which departed from the standard of identity regarded as applicable.

We concede that there is evil in the picture drawn by the government for this court. Occasionally there is "passing off" of imitation food products to consumers. We find, however, that a contrast of the damage to the consumer who is unknowingly served imitation jam, with that which would result to this claimant and untold others were the government successful here, will weigh heavily in favor of the latter. Moreover, the housewife who *wants* to buy a cheaper product for budgetary reasons, seems entitled to some consideration in this whole matter. Perhaps she knows something of which type of product is most appropriate for her family, and should be permitted to make her own choice.

Where unstandardized foods are concerned, the substandard character of an article must be tested by the "customary" standard or norm, as Mr. Campbell points out in the discussions quoted at length by the government (Br. p. 40 et seq.). In order to appreciate the direction of the government's regulatory program in that field, we need only refer to the cases cited by the government in its brief.

In *United States* v. *Two Bags, Each Containing 110 lbs. Poppy Seeds*, 147 F. 2d 123 (C.A. 6), the government proceeded successfully against naturally white poppy seeds tinted blue to resemble a more expensive variety as being adulterated *in interstate commerce*. Yet the evidence clearly showed that the food was not sold *in interstate commerce* as blue poppy seeds, being invoiced as poppy seeds artificially colored. But the consumer of rolls and buns decorated with the seeds would not see the labeling and it was this factor which was determining in the mind of the court. Presumably, therefore, if the buns had borne a sticker or label showing the true character of the seeds, the result would have been the same.

Similarly, in *United States* v. *36 Drums of Pop'n Oil*, 164 F. 2d 250 (C. A. 5), mineral oil for use on popcorn in theatres was held adulterated *in interstate commerce* though properly labeled, because the consumer would not know that mineral oil had been used instead of the customary vegetable oil. But here again, suppose that the dispensing machine had borne a sticker revealing the true character of the oil.

Other cases could be mentioned in the same category of departures from customary standards *at the retail level*.[1] But the point is clear. The government is, in effect, urging that there is a "relation back" of the misbranding to the interstate journey, although the actual misbranding occurs after interstate commerce is ended.

We believe that there is no basis for this theory, either under Section 403(g), as applied to standardized foods, or under any other provisions of the statute. Admitting the presence of abuses, unimpressive as they may be in the ordinary case, we submit that their correction lies with

[1] For an instance in which the government failed, see *United States* v. *55 Cases, etc.*, 62 F. Supp. 843 (D. C. Ida., 1943).

Congress and that no such far reaching extension of the statute should be made by this Court on the representation of any government agency, however unimpeachable that agency's motives may be.

In this connection, the government's argument with respect to the scope of Section 403(e), the imitation provision (Br. pp. 66-69), is not overlooked. It is said that Section 403(e) remains operative with respect to a great many foods which are unstandardized. But we feel impelled to observe that this apparent tolerance of imitations of such foods is somewhat difficult to reconcile with the approach reflected in the *Poppy Seed* and *Pop'n Oil* decisions, above discussed.

II

Neither the Quaker Oats Case nor the Legislative History of the Federal Food, Drug, and Cosmetic Act Is Authority for the Exclusion of Imitation Jam from the Channels of Interstate Commerce.

The Government asserts, and argues at length in Point I of its Brief (A) that this Court's decision in *Federal Security Administrator v. Quaker Oats Company*, 318 U. S. 218, is conclusive of the instant case; and (B) that the legislative history of the Act reflects the purpose of Congress to ban from interstate commerce, products such as Claimant's Imitation Jam.

A. *The Quaker Oats Decision is not conclusive of this case.*

In *Federal Security Administrator* v. *Quaker Oats Company*, 318 U. S. 218, the Quaker Oats Company attacked regulations prescribing standards for "Farina" and "Enriched Farina" for excluding from the standards a wholesome and honestly labeled food product containing vitamin D.

This Court said (318 U. S. at 224):

> "Respondent asserts and the Government agrees, that the Act as supplemented by the Administrator's standards will prevent the marketing of its product *as* 'farina' * * * and that respondent cannot market its product *as* 'enriched farina'." (Emphasis supplied.)

This result followed from the operation of Section 403(g) of the Act. The issue in the *Quaker Oats* case was, then, whether this assumed and agreed result was contemplated by the statute, and whether the regulations prescribing the standards were reasonable and supported by substantial evidence.

This was the only point in the *Quaker Oats* case which is of interest in the instant proceeding. There was no question whatsoever involved as to the legality under the "Farina" and "Enriched Farina" standards of a product which was *not* sold as or under the name of a food for which a standard had been established. The product of the Quaker Oats Company in question was marketed as "Quaker *Farina* enriched by the Sunshine Vitamin", (emphasis supplied) and was, therefore, obviously, sold under the name of and as "Farina", the food for which the standard had been established. Thus, the Quaker Farina "purported and was represented" to be farina, in terms of Section 403(g) of the Act.

Clearly, therefore, the very question involved in the instant case was undisputed in the *Quaker Oats* case, i.e., whether a food which is not sold as or under the name of, the food for which the standard has been established, is misbranded under Section 403(g). It is concededly contrary to the practice of this Court to decide questions of law which are not involved in the litigation before it. Certainly this Court did not intend to pass gratuitously,

in the *Quaker Oats* opinion, upon a matter of the far reaching significance of the question here involved.

The Court's own language is witness enough to the correctness of this view. We have just seen that it was the Court's understanding that the standard would prohibit sale of the Quaker Oats Company's product *as* farina or enriched farina. We may point out that the Court also said (318 U. S., at 232):

> "As we have seen, the legislative history of the statute manifests the purpose of Congress to substitute, for informative labeling, standards of identity of a food, *sold under a common or usual name, so as to give consumers who purchase it under that name*, assurance that they will get what they may reasonably expect to receive." (Emphasis supplied.)

The above statement is quoted by the Government to indicate that our position is unsound (Br., pp. 33-34). It is submitted, however, that the portions in italics lend themselves only to the interpretation that the Court was concerned with a food sold under its common or usual name, that is, the name under which it was standardized—in that case "farina" or "enriched farina". A food sold as an imitation or under some other distinctive labeling was clearly not within the scope of the decision.

The Government cites *Libby, McNeill & Libby* v. *United States*, 148 F. 2d 71 (C.A. 2), which involved catsup containing a preservative not authorized by the standard. The label revealed that the product did not comply with the standard.

The Court, holding the food to be misbranded, said (148 F. 2d at 73):

> "If producers of food products may, *by adding to the common name of any such product mere words of qualification or description*, escape the regulation of

> the Administrator, then the fixing of a standard for commonly known foods become utterly futile for the protection of the consuming public. (Italics supplied.)"

The opinion observed further that the character, appearance, and use of the product led to the conclusion that it purported to be catsup, and rejected the argument that "'purport' is limited to what is disclosed by the label" *and to that alone*. It seems a fair inference that it was the combination of these factors *and* the labeling which led to the conclusion that the article "purported" to be catsup. In effect, this combination added up to a sale of the product *as the food for which the standard had been prescribed.*

Thus, the real test emerges: whether the food is sold *as* the food for which the standard had been prescribed. We think that, unless the Imitation Jam was sold as the standardized food it may not be condemned, and that the Legislative History of the Act supports this view.

B. *The Legislative History of the Act Does Not Reflect a Purpose to Exclude Claimant's Product from Interstate Commerce.*

The Government acknowledges the presence in the Committee reports and the hearings on the proposed 1938 Act of statements "to the effect that no wholesome food was being prescribed" (Br., p. 33). It argues, however, that, if such statements refer to more than a "truly distinctive food, as compared with a variation of a standard food product, they are inconsistent with other statements from the same sources and their authority has been destroyed by the *Quaker Oats* decision". (Br., p. 33.)

We have demonstrated that the authority of such statements was not destroyed by the *Quaker Oats* decision.

Among the statements which the Government urges have been superseded is that from Senate Report No. 493, 73rd

Cong. (1934), quoted in the Government's brief at pages 51 and 52, as follows:

> "It should be noted that the operation of this provision will in no way interfere with the marketing of any food which is wholesome but which does not meet the definition and standard, or for which no definition and standard have been provided; but if an article is sold under a name for which a definition and standard have been provided it must conform to the regulation. This does not preclude the use of distinctive individual brands."

The Government then says that a second Senate Report, No. 361, 74th Congress, repeated the language above quoted and then declared (Br., p. 52):

> "* * * But the loophole afforded the dishonest manufacturer by the so-called 'distinctive name' proviso of the present law will be closed. Under that proviso adulterated and imitation products sold under such names were immune from action. *It is not intended that the authorization to make standards of identity shall apply to foods which are truly proprietary, that is, foods distinctive in content as well as in name, in the manufacture of which some person or concern has exclusive proprietary rights.*" (Italics supplied).

Finally, we find that, in place of Report No. 361 a third report, No. 646, 74th Congress, was substituted, which report completely omitted all of the passage quoted from the two preceding reports except the last sentence above (printed in italics), which refers only to "foods distinctive in content as well as in name".

We are, by the italicized sentence, told just what Congress meant by "distinctive individual brands", as used in the last sentence of the first quotation set forth from Report No. 493, or "distinctive foods" as they are referred to in

the Government's brief. It means "foods distinctive in content as well as in name, in the manufacture of which some person or concern has exclusive proprietary rights". It is quite evident that by their very nature, proprietary foods do not lend themselves to standardization. It is equally evident that the first part of the quotation from Report No. 493, 73rd Congress, was not limited to such foods, for it read: "the operation of this provision will in no way interfere with the marketing of any food which is wholesome". How then, can it be said, as the Government maintains (Br., p. 52) that the references to the marketing of any wholesome food included only "foods distinctive in content as well as in name"?

The purpose of eliminating the distinctive name proviso,[2] as is shown by the testimony of Mr. Campbell quoted by the Government (Br., pp. 39, 40, 44), was to institute, for products like *Bred Spred*, the same requirements of informative labeling, as prevailed for other products not sold under distinctive names. It was in this manner, and not by banning such products from the market, that the "loophole afforded the dishonest manufacturer" by that proviso, was closed. (Senate Report No. 361, 74th Congress, 1st Sess., p. 10.)[3]

Furthermore, it is entirely clear that the last italicized sentence quoted from Report No. 361 deals with the formulation and promulgation of standards of identity and not, as the Government would have it, with the exclusionary effect of those standards. The words are "authorization to *make*" standards of identity. That is by no means the same thing as a declaration of what the legal result of the application of such standards will be. In sum, it is hardly con-

[2] The proviso, Sec. 8 of the Food & Drug Act of 1906, 34 Stat. 770, is quoted at pages 38 and 39 of the Government's brief.

[3] Dunn, Federal Food, Drug & Cosmetic Act (1938), hereinafter referred to as "Dunn."

ceivable that this sentence could be construed to mean any more than that proprietary foods are not to be standardized.

It does not seem needful to recapitulate the Government's argument that Mr. Campbell's testimony that "there can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying" (Br., p. 44, Dunn. p. 1239), and other statements to the same effect, are inconsistent with later utterances or reports of committees. The Government is vague on this point. In fact, it apparently attempts to support the point only by the discussion above dealt with, concerning the meaning of certain Senate Committee Reports. A perusal of Mr. Campbell's remarks is sufficient to see the fallacy of the argument.

In reality, the Food & Drug Administration was interested in two basic improvements: the elimination of the distinctive name proviso, which we have discussed, and the enactment of legally enforceable standards so that, as Mr. Campbell said (Br., p. 44, Dunn. p. 1239), a preserve product deficient in fruit "would be a substandard product and its marketing *as a preserve* would be proscribed" (emphasis supplied) and so that, as Congressman Chapman and Mr. Campbell agreed (Br., p. 45, Dunn. p. 1243) "if a man wants to buy cider which is one part cider and two parts water, he will have the privilege of doing that," but "if it is sold only *as cider* it must have only the quantity of water that the standard permits" (emphasis supplied).

The whole point was that the consumer ought not to pay for water—or some other cheap substitute—thinking he was getting the genuine article which he expected. When does he expect the more expensive or normal product? Obviously, when the food he purchases is sold *as* such product and not otherwise.

We submit, therefore that neither the *Quaker Oats* de-

cision nor the legislative history of the statute lend a whit of substance to the Government's contention that a product such as Claimant's Imitation Jam was to be barred from Interstate Commerce under this Act. Indeed, we go further and express the opinion that, had Congress known that the statements in the Committee Reports above noted and the Declarations of Mr. Campbell were not to be the guiding principles in the Administration of Section 403(g), there would be no such provision in the law.

III

The Imitation Jam under Seizure Was Not Misbranded When Introduced Into Interstate Commerce or While Held for Sale After Shipment in Interstate Commerce.

We have emphasized that the *Quaker Oats* case, the case of *Libby, McNeill & Libby* v. *United States*, 148 F. 2d 71 (C. A. 2), and the legislative history of the statute all point to the conclusion that the aim and effect of the statute, and particularly of Section 403(g), is to prevent the sale of a substandard article *as* a food for which a standard has been prescribed. This, then, is the effect intended by Congress by its use of the term "purport" in Section 403(g).

This view, it seems to us, is not only required by authority and history, but is necessary to avoid the violent consequences which would follow adoption of the Government's position—consequences which, as we have seen, would operate in the field of unstandardized as well as in the field of standardized foods.

We may now consider the application of this view to claimant's Imitation Jam.

There are two jurisdictional aspects to the legal and factual situation presented in the instant case: (1) that aspect relating to misbranding when a food is "introduced

into or while in interstate commerce" and (2) that aspect relating to misbranding while the food is being "held for sale after shipment in interstate commerce" (Sec. 304(a)). The libel filed by the Government alleged both types of misbrandings. Unless the government sustains its charges of misbranding either (1) when the imitation jam was introduced into or while in interstate commerce or (2) while the food was held for sale after shipment in interstate commerce, the instant seizure cannot be maintained.

Aspect number (1) is manifestly not pertinent to the facts of this proceeding. It is clear that the imitation jam was not sold *as* the standardized food in interstate commerce. The lower court found that the good faith of the claimant was not challenged in the proceeding (Finding of Fact 9, R. 22); that the product is sold to the consuming public at prices substantially lower than those of "genuine fruit products" (Finding of Fact 13, R. 23); and "that the articles of food seized are sold in interstate Commerce without deception" (Finding of Fact 17, R. 23).

How can it be said then, in terms of the language of the Act, that the imitation jam was misbranded "when introduced into or while in Interstate Commerce (Sec. 304(a))? Such a conclusion clearly cannot be reached if the test is, as we have suggested, whether or not the food is sold *as* the standardized food. The imitation jam did not, therefore, "purport" and certainly it was not represented, to be the food for which a standard had been prescribed, when it was introduced into or while it was in Interstate Commerce.

Aspect Number (2)—Misbranding while the food is held for sale after shipment in interstate commerce—presents entirely separate considerations.

The concept of the misbranding of an article while it is

being held for sale appeared in the statute as enacted in 1938, in Section 301(k).[4]

This concept was later introduced into the seizure provision (Section 403(a)) by the Miller amendment.[5]

The purpose of Section 301(k) and that portion of Section 304(a) in question is clearly shown by the language employed—to stop local violations which were not reached by the concept of misbranding *in* Interstate Commerce (Aspect (1), supra).

The court found, in the instant case, that (Finding of Fact 11, R. 22):

> "11. That retailers advertise jams, preserves and jellies for sale and in filling telephone orders for same from housewives or other consumers, do frequently fill such orders with imitation jams and jellies *similar to the product* seized in this action and that such product bore the imitation label as hereinbefore set forth." (Emphasis supplied.)

It further found that products "similar to those seized" were sold to ranches, hotels, restaurants, etc., and that "at least on one menu in a hotel" where jellies and preserves were listed, "a product similar and identical to the product seized" was served without disclosure that it was an imitation (Finding of Fact 18, R. 23).

If our view be accepted that the imitation jam was not misbranded when introduced into or while in Interstate Commerce, it will be clear from a review of all the findings of the lower court that the only possible violation of the

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[4] Section 301(k), as amended:

"(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

[5] Act of June 24, 1948, Sec. 1, 62 Stat. 582.

Act in this case is the practice reflected in findings 11 and 18, above noted. It is equally apparent that any such violation is purely local in nature committed either by the retailer or the restaurant or hotel owner, and is cognizable only as a misbranding while the imitation jam is held for sale after shipment in Interstate Commerce.

To reach just such violations was the plain purpose of Section 301(k) and the "held for sale" portion of Section 304(a). If the government had limited its libel allegations to this aspect of misbranding claimant would not be faced with the prospect of business ruin due to local acts over which he had no control. He could, if the government should prevail under such limited allegations, continue to ship his products with no fear of criminal or injunction proceedings against him, since the misbranding would be recognized as a local act for which the shipper himself was not liable.

But do findings 11 and 18 actually reflect a misbranding while the article was held for sale? They refer to abuses, perpetrated in the handling of products "similar" to those seized. Surely the fact that *similar* products are so misbranded does not justify seizure of plaintiff's product in this action, unless it also was misbranded in the manner described by the findings. Only the shipment itself which is misbranded is subject to seizure. We are confident, therefore, that such a novel doctrine will not be espoused by this Court.

Therefore, given these findings of the Court, which concededly did not incorporate in full the offers of proof of the government attorney, we see no substance in the contention that the food in question was misbranded "while being held for sale after shipment in Interstate Commerce". If, however, the Court should take another view, we think we have shown that, in no event is there any basis for application of the drastic theory by the government that the

Imitation Jam was misbranded "when introduced into or while in Interstate Commerce".

IV

The Imitation Jam under Seizure Is a Healthful, Economically Useful Product Sold at a Price 50% Less Than the Standardized Food and Is Not Comparable to Bred Spred.

The government has apparently attempted to associate the guilt of "*Bred Spred*" with claimant's Imitation Jam. (Br. p. 37 et seq.). This attempt to imply that the Imitation Jam was deceptively sold as an economic adulteration in an attempt to "chisel" a larger margin of profit out of the purchasing public is completely refuted by the record in this case and the findings of fact made by the trial court.

In view, however, of the government's implication of improper motivation in the manufacture and marketing of Imitation Jam, we find it necessary to emphasize the critical differences between the product seized here and the "*Bred Spred*" marketed in the early 1930's.

Bred Spred bore no statement of ingredients on its label. The product, although manufactured with 50% of the most expensive ingredients missing was sold to the public at a price "so slightly below the standard quotations for the standard product that there was no indication to the consumer of the difference between the product 'Bredspread' and the product 'preserves'." (Italics supplied.)[6]

By contrast, the Imitation Jam here seized fits every test specified by Mr. Campbell in his official capacity as Commissioner of Food and Drugs, as required of an article of food which should be permitted the channels of interstate commerce.

[6] Statement of W. G. Campbell, Food and Drug Administrator, at Hearings on S. 2800, 73rd Congress, 2d Session, 1934, pp. 512-513; Dunn, p. 1123.

The Imitation Jam is a wholesome, nutritious food (Finding of Fact 5, R. 22). Indeed, there was no attempt on the part of the government to show that it was any less wholesome, any less nutritious, or had any less food value than standardized jam; its label clearly states the ingredients therein contained, together with the word "imitation" as required by the imitation section, Section 403(c) of the 1938 Act; and the product is sold at a price well below that of the standard jam, as will hereafter be seen.

As we have indicated, claimant had, for a number of years prior to the enactment of the 1938 Act, manufactured a food product containing approximately the same proportion of ingredients and cooked to the same degree of consistency as the present product, which was sold to the housewives of America as a "compound". At the request of the Denver station of the Food and Drug Administration, the claimant relabeled his product "Imitation" Jam. A representative label for Imitation Strawberry Jam is attached below.

This label was devised under the direct supervision of the Denver Station, Food and Drug Administration. The trial court found that the labels on the seized articles conformed in all respects with the requirements of Section 343(c), Title 21 U.S.C. (Section 403(c)).[7]

The majority opinion of the Court of Appeals made some mention of the label and indicated that "the name of the fruit and the word "jam" were in larger and bolder letters than the word "Imitation" (R. 59). Claimant believes that if will be apparent to the court that the attached label, which is identical in all respects with the label of the food seized, with the exception of the size of the container and its contents, conforms with the requirements of law. If the Food and Drug Administration should feel, however, that the label does not meet those requirements, claimant will immediately label his "imitation" product to conform.

Claimant is confident that he could continue to market his imitation product and achieve excellent public acceptance of the same even though the law read that the word "imitation" was required to be set in type twice the size of the "name of the food imitated". Claimant is confident of his position in the marketing of a substandard Imitation Jam because, even in the food industry, which is perhaps the most competitive of all retail businesses, he is able to market a wholesome, nutritious food product at a price which is some 50% lower than the price of standardized jam.

Claimant has not and is not embarking upon a program of economic exploitation at the expense of the general public. On the contrary, he passes on the savings to the purchaser in terms of a 50% reduction in price.

As tangible evidence of these savings the following are representative, comparative prices for "imitation" and

[7] Conclusion of Law 3, R. 24.

standardized jam on February 27, 1951 at Safeway Stores, Incorporated, Englewood, Colorado.

SAFEWAY STORES, INCORPORATED

Englewood, Colorado

Prices in effect February 27, 1951

Food Product	Size	Cost per container	Cost per ounce
Delicious Brand, Imitation Strawberry Jam	16 oz.	24¢	1.5¢
Valamont Brand, Pure Strawberry Jam	12 oz.	38¢	3.1¢
Welch Brand, Pure Strawberry Jam	10 oz.	36¢	3.6¢
Delicious Brand, Imitation Grape Jam	31 oz.	36¢	1.16¢
Valamont Brand, Pure Grape Jam	12 oz.	27¢	2.0¢
Delicious Brand, Imitation Red Raspberry Jam	31 oz.	41¢	1.32¢
Old Manse Brand, Pure Red Raspberry Jam	12 oz.	30¢	2.5¢
Welch Brand, Pure Red Raspberry Jam	10 oz.	31¢	3.1¢

The prices above quoted clearly show the price of the "imitation" jam is a "positive indication" to the consumer of the difference between Imitation Jam and standardized jam. The danger expressed by Administrator Campbell in the *Bred Spred* case, as cited on page 40 of the government's brief, is not present in this action. The consuming public knows by the price of the imitation jam, and the "imitation" label itself, that they are not purchasing standardized jam.

Conclusion

For the reasons stated above and in petitioners' opening brief, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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NO. 363

In the Supreme Court of the United States

OCTOBER TERM, 1950

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62 CASES, MORE OR LESS, EACH CONTAINING SIX JARS OF JAM, ETC., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1950 (R. 67), and petition for

rehearing (R. 67-73) was denied on July 22, 1950 (R. 78). The petition for a writ of certiorari was filed on October 16, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an article which purports to be a food for which a standard of identity has been prescribed under Section 401 of the Federal Food, Drug, and Cosmetic Act but which fails to conform to the standard is relieved of a charge of misbranding under Section 403(g) by a label which describes the food as "imitation."

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, c. 675, 52 Stat. 1040, as amended June 24, 1948, c. 613, 62 Stat. 582, 21 U.S.C. 301, *et seq.* (hereinafter sometimes referred to as "the Act"), provides in pertinent part:

> Section 304 (21 U.S.C. 334). (a) Any article of food, * * * that is * * * misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *.

Section 401 (21 U.S.C. 341). Whenever in the judgment of the [Federal Security] Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, * * *.

Section 403 (21 U.S.C. 343). A food shall be deemed to be misbranded—

* * *

(e) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

* * * *

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, * * *.

STATEMENT

A libel of information was filed by the United States in the District Court for the District of New Mexico pursuant to Section 304 of the Federal Food, Drug, and Cosmetic Act seeking the condem-

nation of 62 cases of a food labeled "Imitation Jam" of assorted flavors. The libel alleged that the food was misbranded within the meaning of Section 403(g) of the Act in that it purported to be and was represented as fruit jam, a food for which definitions and standards of identity had been established pursuant to Section 401, but failed to conform to such definitions and standards because it was deficient in fruit and was not concentrated to the degree required by the standards. (R. 3-6). The definitions and standards of identity for fruit jams established pursuant to Section 401[1] provide that these foods shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients, and that the soluble solids content of blackberry, strawberry, and grape jam shall be not less than 68%, and of apricot, peach, and plum jam, not less than 65%. The jams in question contained the ingredients provided for in the standards, but the amount of fruit was reduced to 25% and the deficiency was replaced by a pectin solution. (R. 22-23). The label contained in small type a truthful statement of the proportions of the ingredients (see R. 59).

The Pure Food Manufacturing Co. appeared as claimant and filed an answer admitting that the jam did not comply with the definitions and standards of identity. It denied, however, that the

[1] 21 C.F.R. (1949 ed.) 29.0, pp. 81-84.

article purported to be or was represented as fruit jam, and set up as an affirmative defense the claim that it was "imitation jam," that it was truthfully labeled as such, and that the Act makes specific provision in Section 403(c) for the labeling of imitation foods. (R. 12-14.)

The District Court found that the article under seizure has the appearance of fruit jams for which definitions and standards of identity have been established; that it was made to taste like, and does taste like, standardized fruit jams; that it is used by consumers in place of, and as a substitute for, real fruit jams (R. 24); that it is often advertised as jam and that orders by the consuming public for jam were frequently filled with the article (R. 22); that a menu of a hotel carried the printed statement, "Jellies or preserves served with above orders," and that patrons requesting such foods were served a product identical to the jams in question without disclosure that they did not comply with the standards for jam (R. 23). Notwithstanding these findings the court concluded that the jams did not purport to be and were not represented as fruit jams, and that they were imitation jams and properly labeled under Section 403(c) (R. 24). The libel of information was accordingly dismissed (R. 28).

In reversing the judgment of the District Court, the Court of Appeals held, one judge dissenting, that "the undisputed facts show that they [the

jams in question] purported to be, and were represented to be a fruit jam, for which a definition and standard of identity had been prescribed" (R. 60), and that the manufacturer cannot escape the impact of Sections 401 and 403(g) of the Act by labeling such an article "imitation jam" and by truthfully setting forth on the label the proportions of the ingredients (R. 62-63). The dissenting opinion takes the view that Section 403(c) permits the marketing of the seized article (R. 65).

ARGUMENT

As we read the petition, petitioners do not seriously dispute the holding below that the product, although labeled "imitation jam," purports to be jam, an article of food for which definitions and standards of identity have been prescribed pursuant to Section 401 of the Act, *supra*, p. 3. The real question is whether such a food, so labeled, which does not conform to the standard and is therefore misbranded under Section 403(g), *supra*, p. 3, is nevertheless exempted from a charge of misbranding by reason of Section 403(c), *supra*, p. 3, which provides that a food shall be deemed to be misbranded "If it is an imitation of another food, unless its label bears, * * * the word 'imitation.'"

Section 403(g) is clear and direct. It provides that any product which purports to be a food which has been defined and standardized under Section 401 is misbranded if it does not conform to the definition and standard. Section 403(g) makes no

exception with respect to foods which comply with Section 403(c) or with any other section. It does not provide—as it readily could have been made to provide—that it is not violated by a food which purports to be a standardized food and does not conform to the standard if it is truthfully labeled or if its label contains the word "imitation." The test for compliance with Section 403(g) is (1) whether the food purports to be or is represented as a standardized food, and (2) whether it conforms to the standard.

Our position that the labeling of a sub-standard food as an "imitation" and the truthful disclosure of its ingredients does not relieve it of a charge of misbranding under Section 403(g) is strongly supported by the decision of this Court in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218. In that case the Court, in discussing labeling as related to food standards, pointed out that a standard of identity established pursuant to Section 401 cannot be avoided by truthful and informative labeling (pp. 230-231):

> Both the text and legislative history of the present statute plainly show that its purpose was not confined to a requirement of truthful and informative labeling. False and misleading labeling had been prohibited by the Pure Food and Drug Act of 1906. But it was found that such a prohibition was inadequate to protect the consumer from "economic adultera-

tion," by which less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished, so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold. Sen. Rep. No. 493, 73d Cong., 2d Sess., p. 10; Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 10. The remedy chosen was not a requirement of informative labeling. Rather it was the purpose to authorize the Administrator to promulgate definitions and standards of identity "under which the integrity of food products can be effectively maintained" (H.R. Rep. 2139, 75th Cong., 3d Sess., p. 2; H.R. Rep. 2755, 74th Cong., 2d Sess., p. 4), and to require informative labeling *only where no such standard had been promulgated,* where the food did not purport to comply with a standard, or where the regulations permitted optional ingredients and required their mention on the label. §§403(g), 403(i); see Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 12; Sen. Rep. No. 493, 73d Cong., 2d Sess., pp. 11-12.

The provisions for standards of identity thus reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of prod-

> ucts superficially resembling each other. * * * [Italics supplied.]

In *Libby, McNeill & Libby* v. *United States*, 148 F. 2d 71 (C. A. 2), the product involved complied with the standard established for tomato catsup except that it contained benzoate of soda, which was not permitted by the standard. The claimant attempted to avoid a charge of misbranding under Section 403(g) by labeling the product "tomato catsup with preservative." In affirming the condemnation decree of the District Court, the Court of Appeals said (p. 73):

> If producers of food products may, by adding to the common name of any such product mere words of qualification or description, escape the regulation of the Administrator, then the fixing of a standard for commonly known foods becomes utterly futile as an instrument for the protection of the consuming public.

That Congress intended that the integrity of identity standards be upheld and that they be applied without variation is also clear from other provisions of the Act. Congress granted permission in Section 403(h) (21 U.S.C. 343 (h)) to use a statement on the label to show that an article of food falls below a standard of *quality* or below a standard of *fill of container* established by the Administrator under Section 401. No such permis-

sion was granted in Section 403(g) as to an article of food which does not conform to an applicable standard of *identity*. The very fact that Congress thus specifically provided for the use of a substandard legend in respect of quality or fill of container but made no similar provision in respect of a standard of identity is cogent evidence of a purpose not to permit evasion of such a standard by labeling the food as an imitation.

This conclusion is supported as well by Sections 401 and 403(g), when considered in relation to the "distinctive name" proviso of Section 8 of the Food and Drug Act of 1906, 34 Stat. 771.[2] Experience under that proviso had demonstrated the deficiencies of the old statute in preventing the debasing and cheapening of food products by economic adulteration. Thus in *United States v. Ten Cases, More or Less, Bred Spred*, 49 F. 2d 87 (C.A. 8), the Government proceeded under the 1906 Act against a product sold under the name "Bred Spred," which resembled jam but contained only

[2] "* * * *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced."

half the normal fruit content, as measured by trade and household practices. The Court of Appeals affirmed a judgment for the claimant, holding that the product was neither adulterated nor misbranded because it was sold under its "distinctive name." The House Committee on Interstate and Foreign Commerce, in reporting on the bill which was enacted as the Federal Food, Drug, and Cosmetic Act, referred to this decision as follows (H. Rep. No. 2139, 75th Cong., 3d sess., p. 5, accompanying S. 5):

> Section 401 provides much needed authority for the establishment of definitions and standards of identity and reasonable standards of quality and fill of container for food. One great weakness in the present food and drugs law is the absence of authoritative definitions and standards of identity except in the case of butter and some canned foods. The Government repeatedly has had difficulty in holding such articles as commercial jams and preserves and many other foods to the time-honored standards employed by housewives and reputable manufacturers. The housewife makes preserves by using equal parts of fruit and sugar. The fruit is the expensive ingredient, and there has been a tendency on the part of some manufacturers to use less and less fruit and more and more sugar.

> The Government has recently lost several cases where such stretching in fruit was involved because the courts held that the well-established standard of the home, followed also by the great bulk of manufacturers, is not legally binding under existing law.[3]

It is clear, therefore, that Congress intended in Sections 401 and 403(g) to do away with the doctrine of the *Bred Spred* case and require strict adherence to standards of identity established under Section 401, without regard to the name or the truthfulness and accuracy of the labels a manufacturer might attach to a product which purports to be a standardized food.

In the light of these considerations it cannot validly be contended that the provisions of Section 403(e) concerning the labeling of imitation foods creates a loophole for avoidance of the independent provisions of Sections 401 and 403(g) covering standardized foods. Section 403(e) is not, as

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[3] Petitioners' reliance (Pet. 16-17) upon the testimony in 1935 of Walter G. Campbell, then Chief of the Food and Drug Administration, is unavailing. The fact that at that time Mr. Campbell stated as his opinion that there should be no objection to marketing a sub-standard food which is truthfully labeled is not persuasive in view of this Court's views in the *Quaker Oats* case, *supra*, concerning the legislative purpose in enacting Sections 401 and 403(g). Cf. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 125. Moreover, Mr. Campbell was not there discussing the "imitation" provision and there is nothing in his testimony to indicate that he thought that "imitation jam" is a completely truthful and informative label.

petitioners contend, the equivalent of the second proviso of Section 8 of the 1906 Act, 34 Stat. 771, which had the effect of *exempting* imitation foods, labeled as such, from both the adulteration and misbranding provisions of that statute.[4] Section 403(c) covers generally a distinctive method of misbranding whereby an imitation is foisted upon the consuming public as a genuine article. Thus, there is ample room for that subsection to operate on foods for which no standards of identity have been established. On the other hand, Sections 401 and 403(g), as the history of these provisions show, were aimed specifically at economic adulteration of foods for which standards of identity have been established. As to such foods, Section 403(g) categorically requires strict adherence to the standards. Petitioners' contention would defeat the purpose of Sections 401 and 403(g) to substitute standards of identity for a requirement of truthful and informative labeling (*Federal Security Administrator* v. *Quaker Oats Co., supra*) by reading Section 403(c) as though, like the second proviso of Sec-

[4] "* * * *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

* * *

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: * * *"

tion 8 of the 1966 Act, it creates a general exemption for all imitation foods labeled as such.

It should be noted in this connection that if petitioners are right in their contention that Section 403(c) creates an exemption to Section 403(g), it would seem to follow that Section 403(k) (21 U.S.C. 343(k) adds still another exception. The latter subsection provides that a food will be deemed to be misbranded "If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact." We think it could hardly be contended that Section 403(k) permits the use, in a standardized food, of artificial ingredients not authorized by the standard. Such a contention is effectively met by the decision in the *Libby, McNeill & Libby* case, *supra*.

It is illogical to argue that proof of compliance with one of the definitions of misbranded foods contained in Section 403 precludes inquiry as to whether a food is misbranded in another respect. It has never been held that compliance with one provision of the Act in any way cures a violation of some other provision. On the contrary, the effect of the decisions is that the various provisions against misbranding and adulteration are each to be given their full effect so as to give the ultimate consumer the full protection of all those provisions. *United States* v. *Coca Cola Co.*, 241 U.S. 265, 278; *United States* v. *Two Bags * * * Poppy Seeds*, 147 F. 2d 123 (C.A. 6); *United States* v.

36 Drums of Pop'n Oil, 164 F. 2d 250 (C.A. 5); *United States v. 716 Cases, etc., Del Comida Brand Tomatoes*, 179 F. 2d 174 (C.A. 10).

Section 403(g) is the key provision of the statute for the enforcement of definitions and standards of identity established pursuant to Section 401. If Section 403(g) can be circumvented by the simple device of using an "imitation" label on a product which does not conform to a definition and standard of identity, but which by appearance and taste and merchandising practices conveys the impression that it is a food for which such a standard has been prescribed, the effectiveness of the section, and the salutary features of food standardization, would be destroyed.

It is urged (Pet. 13-15) that petitioners have been trapped by a change of administrative policy in respect of foods labeled "imitation" which purport to be or are represented as standardized foods. It is true that during the first few years after the passage of the 1938 Act the Food and Drug Administration was uncertain as to the position it should adopt regarding foods which purport to be standardized foods, and the Administration in certain informal opinions to the trade[5] sanctioned the

[5] "These opinions are excerpts from day-by-day replies to inquiries concerning the application of the statute to specific problems. They represent the attitude of the Administration in the light of the facts submitted and other available information. Thus, the views expressed are subject to modifica-

use of the word "imitation" on the labels of foods which did not meet the appropriate standard. Later, in the *Quaker Oats* case, *supra*, decided in 1943, this Court concluded after a comprehensive review of the legislative history that Congress deliberately adopted standards of identity as a substitute for informative labeling. It was in reliance upon this decision that the Administration reversed its former policy.[6] The present policy as represented by our contentions here has been followed ever since. There is therefore no basis for petitioners' contention that they were misled by "a swift change" (Pet. 15) of administrative policy.

Petitioners attempt to make much of the statements in the last paragraph of the majority opinion below (R. 63) to the effect that the decision will not necessarily have the effect of driving substandard foods out of the market and that petitioners' product might be marketed under some other name so long as it does not purport to be fruit jam. Petitioners argue that the effect of this

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tion by the Administration as additional facts may become available and controlling decisions are rendered by the Federal Courts." Kleinfeld & Dunn, *Federal Food, Drug, and Cosmetic Act*, p. 561.

[6] In Trade Correspondence #427, dated April 14, 1945, Kleinfeld and Dunn, *supra*, p. 746, it was stated that pineapple products purporting to be pineapple preserves, but not complying with the standard, are illegal under any form of labeling, even if labeled as imitation pineapple preserves.

dictum will be to create confusion and revive the doctrine of the *Bred Spred* case, *supra* (Pet. 9-11, 12-13). We agree that these statements were unnecessary to the decision, and we think they are wrong. We attempted to have them eliminated by filing a suggestion for modification of the opinion (R. 74-77). However, the short answer to petitioners' reliance upon these statements by the majority below as a basis for invoking the certiorari jurisdiction of this Court is that they were only dicta and that it will be time enough to consider the questions they evoke when the hypothetical situations to which they relate are actually presented for decision.

CONCLUSION

For the reasons stated, we respectfully submit that the case does not warrant further review, and that the petition for a writ of certiorari should be denied.

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November, 1950.

U. S. GOVERNMENT PRINTING OFFICE 1950—914626/P. O. 296

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filed on October 16, 1950, and was granted on November 27, 1950 (R. 79). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 403(g) of the Federal Food, Drug, and Cosmetic Act declares a food to be misbranded if it purports to be or is represented as a food for which a standard of identity has been prescribed but fails to conform to the standard. Section 403(c) provides that a food shall be deemed misbranded if it is an imitation of another food, unless its label prominently bears the word "*imitation*" in association with the name of the food imitated. The questions presented are:

1. Is a product labeled "imitation jam", which looks and tastes like jam and is accepted as jam by many consumers, but which does not conform to the standard of identity prescribed for jam, misbranded within Section 403(g) because, as the court below held, it "purports to be" and is represented as jam?

2. Is a substandard product which would otherwise violate Section 403(g), because it "purports to be" jam but fails to conform to the standard of identity prescribed for jam, saved from the condemnation of that section because it is labeled "imitation jam" and hence is not misbranded in so far as Section 403(c) is concerned?

STATUTE AND REGULATIONS INVOLVED

The statute involved is the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. §§ 301, *et seq.*, copies of which will be made avail-

able to the Court. The provisions most pertinent to this case are as follows:

> Sec. 304(a) [as amended by the Act of June 24, 1948, 62 Stat. 582]. Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * * .
>
> Sec. 401. Whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: * * * In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Administrator shall, for the purpose of promoting honesty and fair dealing in the interest of consumers, designate the optional ingredients which shall be named on the label. * * *
>
> Sec. 403. A food shall be deemed to be misbranded * * *
>
> (c) If it is an imitation of another food, unless its label bears, in type of uniform size

and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

* * * * * * * *

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

The regulations establishing a standard of identity for fruit preserves or jam appear in 21 C.F.R., Sec. 29.0, 5 Fed. Reg. 3554, and are printed in the appendix to this brief.

STATEMENT

The definition and standard of identity of fruit jam was established by the Federal Security Administrator in 1940 after public hearings required by Section 701(e) (21 U.S.C. 371(e)). The legality of the regulation is not in issue. Briefly stated, the standard of identity provides that fruit jam shall be composed of not less than 45 parts by weight of fruit to each 55 parts by weight of one of the designated saccharine ingredients; and that the soluble solids of blackberry, strawberry, and grape jam shall be not less than 68%, and of apricot, peach and plum jam not less than 65%. 21 C.F.R., Sec. 29.0(a), 5 Fed. Reg. 3554. The foods

involved in this case admittedly do not conform to the standard (R. 12-13). They contain the ingredients provided for in the standard, but their fruit content is only 25% and this deficiency is made up by a 20% water solution of pectin (R. 22, 23, 51, 59).[1]

The Pleadings. In March, 1949, a libel was filed in the United States District Court for the District of New Mexico, pursuant to Section 304(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 334(a)), seeking the seizure and condemnation of 62 cases, more or less, of "jam, assorted flavors" (R. 3-4). The libel alleged that the food was misbranded within the meaning of Section 403(g) when introduced into and while in interstate commerce and while held for sale after shipment in interstate commerce in that it purported to be and was represented as fruit jam, a food for which a definition and standard of identity had been established by the Administrator, but failed to conform to the definition and standard because it was deficient in fruit and was not concentrated to the extent required by the standard (R. 3-6).

The Pure Food Manufacturing Company appeared as claimant and filed an answer admitting the interstate shipment of the food and that it failed to comply with the definition and standard of identity for fruit jam. It denied that the article purported to be or was represented as fruit jam, and alleged as an affirmative defense that the food was "imitation jam," that it was so labeled, and that Congress had "ratified the manufacture and sale in interstate commerce of 'imitation jams'

[1] The label, which states the ingredients and gives the proportions thereof, appears *infra*, p. 6.

and other 'imitation' foods when it passed". Section 403(e) (R. 12-14.)

The Trial. A pre-trial conference in the District Court (R. 30) developed into a trial without witnesses (R. 36-37). At the court's suggestion (R. 36, 40), each attorney detailed the evidence he expected to adduce (R. 37-48) and the other agreed that the stated proof could be made (R. 43-44, 46-47). The statements of counsel were admitted as testimony on which the decision was reached (R. 48-49).

It was agreed that the composition of the food under seizure is approximately as indicated on the label (R. 51) except that "20% pectin" should "more accurately be described as a 20% pectin solution" (R. 51, 59, 22-3). The label reads as follows:[2]

Net Wt. 5 Lbs. 2 Oz.
Delicious Brand
Imitation
Strawberry Jam
[or Grape, Apricot, Plum, Peach, Blackberry Jam]
made from 55% sugar, 25% fruit
20% pectin, citric acid, 1/10 of 1%
benzoate of soda
Packed by
The Pure Food Mfg. Co.
Denver, Colorado

The Government's attorney stated that his witnesses would testify (1) that the Delicious Brand

[2] The complete label is on an original exhibit (R. 49), but does not appear in the printed record except as a part of the Court of Appeals' opinion (R. 59). The original exhibit has been certified to this Court.

Imitation[3] Jam, five-pound two ounce size, had been served in hotel dining rooms, restaurants, and other public eating places as[3]—and sometimes in response to requests for—fruit jam without a label or other disclosure describing it as "imitation jam" (R. 32, 34-35, 38-39, 41); (2) that retail grocery stores advertised these "imitation jams" as "strawberry jam," "plum jam," etc., and filled telephone orders from housewives asking for the advertised jams with Delicious Brand Imitation Jam (R. 43); (3) that ranches and logging camps served Delicious Brand Imitation Jams to their employees as fruit jam and that such employees were not shown the labels and consumed the jam mistakenly believing it to be genuine fruit jam (R. 34-35, 38, 43, 47-48); and (4) that the Delicious Brand Imitation Jam looked like jam, tasted like jam, was used as a substitute for jam, and without the label could not be distinguished by the average consumer from jam (R. 47-48). The Government refused to stipulate that the food is "imitation jam" (R. 31).

Claimant's attorney stated that his witnesses would testify that its product was wholesome and sanitary and had food value, that the labels correctly set forth the ingredients and the proportions of each in the food, that the product had been

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[3] An inspector of the Pure Food and Drug Administration would have testified that jam served to him in the Yucca Hotel, pursuant to a menu referring to "jellies or preserves," was determined to be claimant's Delicious Brand Imitation Jam, that he ascertained that this jam came from a particular wholesale house, and that the product seized in this case was the "parent lot" in the wholesale house from which the Yucca Hotel jam came (R. 41-42).

manufactured as "imitation jam" for a period in excess of fifteen years, that "prior to that time"[4]—the label had been changed from "compound jam" to "imitation jam" at the request of the Denver Station of the Food and Drug Administration, that the product is sold to wholesalers, that a majority is marketed through retail food stores with the label prominently displayed, but that wholesalers may, in their discretion, sell to hotels, restaurants, logging camps, and ranches, that in the majority of instances the price is 50% lower than the price of pure fruit jams, that some consumers prefer the product to pure fruit jam, that some consumers would testify that they purchased the product as imitation jam for use on the table in lieu of more expensive butter and oleomargarine (R. 44-45).

Findings and Opinions. The trial court found the facts substantially as stated by the parties (R. 21-24, 49-52), and concluded that although claimant's food did not comply with the standard of identity for fruit preserves and jam, it did not purport to be and was not anything but imitation jam, and was therefore not required to comply with the standards (R. 22-25). In its conclusions of law (R. 25), the court also held that the primary purpose of the Act "is to protect the consuming public, the ultimate consumer," that the Act was "not

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[4] This request of the Food and Drug Administration, made over fifteen years before the trial, obviously antedated the 1938 statute, and thus occurred prior to the promulgation of definitions and standards of identity for jam. These pre-1938 activities lost their legal significance upon the enactment of the present statute and the adoption of the definition and standard of identity for jam.

intended primarily to protect the ultimate purchaser as distinguished from the ultimate consumer," that the word " 'purport' * * * should be construed to have its usual ordinary meaning," and "that where menus in public eating places, and employer's private dining halls offer for sale or consumption a food which simulates a standardized food, without disclosing that such article is not the standardized food, such simulated food is represented to such patrons, guests and employees, as the standardized food." In its opinion, the District Court reasoned that food branded as an imitation in compliance with Section 403(c) could not be deemed misbranded under Section 403(g) (R. 25-27). Judgment was entered on October 20, 1949, dismissing the libel (R. 28).

In reversing the judgment of the District Court, the Court of Appeals for the Tenth Circuit held, one judge dissenting (R. 57-63, 64-67), that "the jams under seizure * * * are a substandard jam. They are not imitation fruit jam. We think the undisputed facts show that they purported to be, and were represented to be a fruit jam, for which a definition and standard of identity had been prescribed" (R. 60), and that the manufacturer cannot escape the impact of Sections 401 and 403(g) by labeling such an article "imitation jam" and truthfully setting forth on the label the proportions of ingredients (R. 62-63).

SUMMARY OF ARGUMENT

I

A. Claimant's product purports to be jam within the meaning of Section 403(g). It looks and tastes like jam, has the same ingredients as jam, though with less of the principal and most expensive ingredient, the fruit. It is sometimes advertised at retail as jam and sold as jam in response to telephone orders and in public eating places. Particularly to the consumers who do not see the label, it purports to be jam and nothing else. As the trial court conceded, the statute is designed to protect such consumers with all others, and it has been uniformly construed as reaching products which might deceive or confuse them. In determining whether a product purports to be a standardized food, all pertinent factors must be considered; the word "imitation" on the label is not controlling, and indeed should be given little or no weight when a product by its inherent nature and appearance resembles a standardized article or when many consumers do not see the label.

B. Claimant's product is, in fact, an inferior grade of jam, not an imitation of jam. But even if it be assumed that "imitation jam" is truthful labeling, claimant's position is not advanced. For *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218, establishes that truthful, informative labeling does not immunize a departure from the prescribed standards of identity. That decision, and the history of the Act, show that the provisions for standards of identity have a dual purpose (1) to protect the consumer against economic

adulteration by which ingredients customarily used are replaced by inferior, less expensive items, and (2) to prevent the confusion of consumers which results when various combinations of ingredients are permissible. Experience has proved, and Congress has determined, that accurate labeling is not adequate protection against these evils. Both of these objects would be frustrated if substandard products could be sold so long as they were labeled "imitation." For the word "imitation" could be used freely on any substandard foods sold in public eating places to consumers who do not see the label, and jam marked "imitation" could be prepared in any number of combinations of the orthodox ingredients in disregard of the proportion approved in the prescribed standard.

C. The legislative history of the provisions for standards of identity shows that Congress was seeking to overturn court decisions with respect to the very type of product involved in this case—jam with one half the customary fruit content marketed under another name, Bred Spred. Although there are statements in the hearings and in an early version of a committee report that no wholesome food, truthfully labeled, was being proscribed, other and subsequent statements from the same sources show that only "foods distinctive in content as well as in name," not inferior, diluted forms of a standardized article, were not to be required to comply with standards of identity. The repeated reference to the Bred Spred cases in the hearings and committee reports makes this clear. And the *Quaker Oats* case squarely holds that wholesome products not conforming to the stand-

ards may not be marketed. Here we do not have a distinctive food, but so-called "imitation" jam, which is nothing more than jam with a reduced proportion of the most valuable ingredient. There can be no doubt that Section 403(g) was meant to reach such a product irrespective of the label.

II

Section 403(c) does not exempt imitation products from the operation of Section 403(g). The former subsection provides that—

> * * * A food shall be deemed to be misbranded—
>
> * * * * * * * *
>
> (c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word 'imitation' and, immediately thereafter, the name of the food imitated.

The "unless" clause merely excepts prominently labeled imitations from the prohibition in Section 403(c) itself, not from any other part of the statute. In contrast, in the 1906 Act, imitations so labeled were specifically excepted from all the prohibitions against adulteration and misbranding. It is "impossible to say that the framers of the 1938 Act" narrowed the content of the exception for prominently labeled imitations "for the useless purpose of achieving the same result as had been reached under the 1906 Act". Cf. *United States* v. *Walsh*, 331 U.S. 432, 437.

The structure of Section 403 demonstrates that the various subsections defining different types of

misbranding are independent. Many of these subsections contain exceptions—"unless" clauses—similar to that in Subsection (c), and these clearly only except from the subsection in which the clause is contained. Decisions of two courts of appeals under the 1938 Act and of this Court in construing the 1906 Act have held that the definitions of the various kinds of misbranding are independent.

As has been indicated, the purpose of Section 403(g) would be defeated if a product containing a lesser amount of the principal ingredient but which, by reason of its composition, appearance, and taste, still purported to be the standardized commodity, could be freely sold if the word "imitation" were placed on the label. The legislative history upon which claimant relies did not relate to the imitation subsection (Section 403(c)), but to Section 403(g), which has already been discussed.

To hold that a product such as claimant's violates Section 403(g) does not render Section 403(c) meaningless. The latter provision still remains operative for a great many foods for which standards of identity have not been fixed, as well as for foods labeled "imitation" but not purporting to be the standardized article.

This does not mean that persons of modest means need be deprived of inexpensive and wholesome food products. But once a standard of identity has been established for a food, the proper means of marketing a less expensive, but nevertheless wholesome, product of the same type is not to violate the standard of identity with an article inappropriately labeled "imitation" but to request ad-

ministrative approval of an additional standard for the lower priced commodity. The Administrator then, after a hearing and a full record, can take into consideration both the extent to which the public would be confused or deceived by two kinds of jam, one lower in fruit content than the other, and the assumed advantage to the public in having a more economical but inferior grade of jam on the market. No such request has been made for the product marketed by claimant.

ARGUMENT

The question in this case is whether the product seized was misbranded within the meaning of Section 403(g) of the Federal Food, Drug, and Cosmetic Act, which defines food as misbranded "if it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 401, unless (1) it conforms to such definition and standard * * *." By appropriate regulation, the Food and Drug Administrator has provided that fruit jam shall contain not less than 45 parts by weight of fruit to each 55 parts of saccharine ingredients. 5 Fed. Reg. 3554, 3557; 21 C.F.R. § 29.0 (1949). The product seized in this case contains 25 per cent fruit, 55 per cent sugar, and 20 per cent of a water solution of pectin (R. 59, 22-3; Orig. Ex. (jar with label)). The product thus contains the ingredients of jam, though in proportions which minimize the valuable ingredient. It looks like jam and tastes like jam, and many consumers purchase it or eat it in the belief that it is jam.

The precise question presented by this case is whether the fact that this product is labeled "Imitation Jam" takes it out of the purview of Section 403(g). This question has two aspects:

1. Does the fact that a product is labeled "imitation" jam conclusively establish, despite the existence of the other factors just mentioned, that it does not purport to be jam within the meaning of Section 403(g);

2. Does Section 403(c), which defines food as misbranded

> If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated,

immunize food labeled "imitation" from the requirements of Section 403(g).

I

Claimant's Product Is Misbranded in Violation of Section 403(g) Because It Purports to be Jam But Does Not Conform to the Standards Established for Jam

A. The Product in Fact Purports to be Jam to Many of Its Consumers.

There is no dispute as to the facts. In substance, the case was tried upon an agreed statement. The trial court found that petitioner's product "has the appearance of" standard jam and "is made to taste like and does taste like" standard jam and was "used by the consumer in place of, and as a

substitution for" standard jam. (R. 24). The court found specifically (Finding 11, R. 22):

> That retailers advertise jams, preserves and jellies for sale and in filling telephone orders for same from housewives or other consumers, do frequently fill such orders with imitations jams and jellies similar to the product seized in this action and that such product bore the imitation label as hereinbefore set forth.

The court also found that the product was offered to and received by patrons and employees at hotels, restaurants, ranches, and logging camps as jam, and that such persons had no opportunity of seeing the label or knowing that they were eating anything but jam (R. 23-4). The evidence was also undisputed that a majority of the product is marketed "through retail food stores to ultimate consumers" (R. 45) labeled as on the articles seized, that the price is approximately 50 per cent lower than for pure fruit jams, and that some consumers purchased the product "as imitation jam" in the large 5 lb. 2 oz. containers for use in lieu of more expensive butter and oleomargarine (R. 44-46).[5] (This "majority" sold by retailers would include, of course, the goods sold by retailers to consumers in response to advertising as, or as a result of telephone orders for, jam.)

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[5] Finding 14 (R. 23), that "a majority of the 5 lb. 2 oz. containers of imitation jam are sold and consumed by large families in lieu of butter or butter substitutes" is an inaccurate summation of claimant's offer of proof. The "majority" referred to by claimant (R. 44) were all the purchasers in retail stores, not necessarily consumers with large families using jam in lieu of butter and oleomargarine.

The trial court conceded that "purport" should be given its "usual ordinary meaning" (R. 25). As defined by the Court of Appeals for the Second Circuit, "purporting means 'to have the appearance or to convey the impression of being, meaning, or signifying (some particular thing).'" *United States* v. *Maguire*, 64 F. 2d 485, 491 (C.A. 2), certiorari denied 290 U.S. 645, quoting Webster's International Dictionary.

Here by its very nature—its ingredients, taste, appearance, use, etc.—claimant's product purports to be jam, wherever it may be found, and no matter how it is labeled. The fact that purchasers in retail stores have an opportunity to see the labels on the jars does not mean that for them the product does not purport to be jam. They would also be influenced by the appearance of the jar and its contents,[6] and by their experience in tasting and using it. Certainly a purchaser who opened and tasted the product would from then on believe it to be jam regardless of the labeling. These factors, together with the label and price, would give the consumer the impression that the product was an inferior type of jam, which was true, but the purchaser, like the Court of Appeals, would not believe that the product was anything but jam. Thus, even as to purchasers aware of the labeling and price, the product would still purport to be jam.

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[6] The entire label on the large jars covers an area of two square inches. The jar has an area of approximately one hundred square inches. The word "imitation" as it appears on the label is less than one-fourth of an inch high.

But even if these consumers who saw the label are excluded from consideration, the result in this case would be the same. For claimant's product certainly both purports to be and is represented as jam to those consumers to whom it is sold and served when they ask for jam, whether in restaurants or hotels, or when retail stores advertise it as jam and send it as jam in response to telephone orders (R. 43). Such consumers do not see the label on the jars when the jam is ordered. To them it professes to be jam and nothing else. And indeed, the trial court found that as to persons in public eating places and employer's private dining hall "such simulated food is represented * * * as the standardized food" (R. 25).[7]

It is not necessary that *all* persons who consume a product be deceived for a product to be misbranded. Some persons will always read labels more carefully than others; some will not, and others cannot read them at all.[8] Certainly if claimant's product "purports to be" and is "represented as" jam to a substantial portion of its consumers—whether or not a majority—that is sufficient

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[7] The record contains no support for claimant's characterization of these transactions as "certain isolated instances" (Br. p. 25). The trial court made no such finding and the only evidence as to proportions was claimant's statement that "a majority" of the 5 lb. 2 oz. jars "are marketed through retail food stores" (R. 44-45). If all but "certain isolated instances" had been so marketed, claimant would doubtless have so stated.

[8] As long ago as 1919, this Court, in a case involving a similar problem, recognized that "few purchasers read long labels, many cannot read them at all * * * ". *Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479, 487.

to violate Section 403(g). Since claimant has offered to prove only that "a majority of the five pound two ounce jars" were sold through retail stores (R. 44-45), it is apparent that a very substantial proportion was marketed through other outlets, such as restaurants, hotels, ranches, and logging camps, where the ultimate consumer would not see the label and would believe the product served to be jam.

It is established that Section 403(g) and related provisions of the Federal Food, Drug, and Cosmetic Act are violated by conduct which may not deceive or confuse an immediate purchaser of the labeled container, but which does deceive the ultimate consumer. This seems to have been conceded by the District Court. (Conclusions of Law 6-9, R. 25, quoted at pp. 8-9, *supra.*) Directly in point is *Libby, McNeill & Libby* v. *United States,* 148 F. 2d 71 (C.A. 2), affirming *United States* v. *306 Cases Containing Sandford Tomato Catsup With Preservative,* 55 F. Supp. 725 (E.D. N.Y.), which involved catsup containing a cheap preservative which in part replaced sugar and vinegar, the ingredients approved in the standard of identity. The catsup was not sold in the ordinary bottles for household consumption, but "only in No. 10 cans (7 lbs.) to institutional users for cocktail sauces and cooking." "The evidence indicated that some of it found its way to individuals via unlabeled cruets on the counters of luncheonettes and small restaurants" (55 F. Supp., at 727). The District Court held that *(ibid)*:

> The Administrator may well have found that honesty and fair dealing required that patrons

> of these luncheonettes were entitled to assume that the product they were using was the same tomato catsup they would purchase for home consumption. Catsup sold for home use in small bottles did not contain benzoate of soda.

The Court of Appeals affirmed, saying (148 F. 2d, at 73):

> Neither the decision nor its rationalization in the Quaker Oats case can be escaped by a product that looks, tastes, and smells like catsup, which caters to the market for catsup, which dealers bought, sold, ordered, and invoiced as catsup, without reference to the preservative, *and which substituted for catsup on the tables of low priced restaurants.* The observation in the opinion that it was the purpose of the Congress to require informative labeling "where the food did not purport to comply with a standard" is not to be lifted out of its context, given a meaning repugnant to the decision, so as to limit "purport" to what is disclosed by the label and to that alone. [Italics supplied.]

The Court of Appeals for the Sixth Circuit had come to the same conclusion in a libel against artificially colored poppy seeds sold in a properly labeled container to the wholesale purchaser, but resold for use in bakery products by the ultimate consumer.[9] *United States* v. *Two Bags, Each Con-*

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[9] This and the following case arose under Section 402(b), not 403(g), but since they involved economic adulteration of the same sort as the latter provision was designed to prevent, they are equally applicable here.

taining 110 Lbs. Poppy Seeds, 147 F. 2d 123 (C.A. 6). The Court of Appeals declared (p. 127):

> Here, the consumer would be unaware that less expensive ingredients had been substituted and that the article was inferior to that which he expected to receive when making his purchase. The fact that the substituted article was not deleterious is immaterial. From its inception, to its last amendment, the Pure Food and Drugs Act was not designed primarily for the protection of merchants and traders; but was intended to protect the consuming public.
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> * * * * * *
>
> Whether dealers or traders in articles are deceived is not the material question. The appropriate inquiry is whether the ultimate purchaser will be misled. * * *
>
> * * * * * *
>
> The erroneous conclusion reached by the district court seems to stem from confusion concerning the primary purpose of the Act, which, as has been demonstrated, is not protection of jobbers, dealers, or traders, but protection of the ultimate consumer. * * *

The decision of the Fifth Circuit in *United States* v. *86 Drums of Pop'n Oil*, 164 F. 2d 250 (C.A. 5) is to the same effect. The mineral oil to be used on popcorn sold in theatres, shipped in properly labeled drums, was held adulterated because the ultimate purchaser of the popcorn would not know that the popcorn dressing consisted of

mineral oil instead of the customary and superior butter or vegetable oil.

These cases hold, in accordance with the primary purpose of the statute, that the provisions of the Act designed to prevent economic adulteration must be construed so as to protect the ultimate consumers, including those who will not see the product in the properly labeled container. In this case, the substantial proportion of consumers who eat in hotels, restaurants, ranches or logging camps falls in this category. At least as to those consumers—and we believe also as to most others—claimant's product purported to be jam.

In determining whether a food purports to be a standardized food, many factors, such as appearance, taste, ingredients, methods of advertising, sale and distribution, must be taken into consideration. Where a food by its appearance, taste, color and ingredients simulates a standardized food, differing only in that a gelatinized solution consisting largely of water[10] has replaced part of the fruit, the possibility of deception would seem to be inherent in the product itself irrespective of what it is called. Certainly the words on the label are not controlling when most other indicia lead to the conclusion that the product purports to be the standardized food. And where substantial amounts of the product are merchandised in such a manner that the ultimate consumer is given no opportunity to observe the label, the statements on the label would seem to be entitled to no weight

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[10] See R. 59, 23, 51, the administrative finding quoted at p. 31, *infra*, and the testimony of Mr. Campbell quoted at pp. 43-44, 46, *infra*.

at all. Indeed, although it is not necessary to go that far in this case, the *Quaker Oats* case, discussed *infra*, pp. 27-34, which holds that the statutory provision "was not a requirement of informative labeling" but a means whereby "the integrity of food products can be effectively maintained" (318 U.S. at 230), would seem to suggest that labeling is entirely irrelevant.

The District Court's findings were based on an erroneous interpretation of the law.— In this case the District Court conceded that those consumers who did not see the label would not be informed that they were consuming or eating an imitation product (Findings 18, 19, R. 23-24, 34-35), and also found that such consumers and not merely the direct purchasers are subject to the protection of the Act (Conclusions 6, 7, R. 25). The court nevertheless found that the articles of food seized "purport to be and are represented as imitation fruit preserves * * * and nothing else" (Fdg. 16, R. 23; Conc. 4, R. 24), and claimant argues that this is a finding of fact which is binding on the appellate courts because not clearly erroneous. But this ultimate finding, whether it be denominated one of fact or of law, is obviously merely the District Court's conclusion, based on the specific facts found. We submit that the finding is clearly erroneous because inconsistent with the specific factual findings already summarized—and in particular the findings as to advertising by retailers of claimant's product as jam and sales to persons who ordered jam by telephone (Fdg. 11, R. 22, *supra*, p. 16), and the findings as to consumers who were served the jam without seeing the label (Fdgs. 18-

19, R. 23-24), combined with the findings that the product looks and tastes like jam (Fdgs. 20, 21, R. 24). The inconsistency between the court's ultimate conclusion and the specific facts found shows that it erred as a matter of law in interpreting and applying the statutory terms.

Secondly, the District Court's opinion both states[11] and clearly shows (R. 25-7) that it rests on legal rather than on factual considerations,[12] i.e., the belief that the use of the word "imitation" in such manner as not to violate Section 403(c) precludes a finding of misbranding under Section 403(g). Thirdly, since the facts were in effect stipulated and there were no witnesses and no questions as to credibility, the District Court had no advantage over the Court of Appeals in evaluating the evidence. The Court of Appeals was therefore able to appraise the evidence—which in this case means to determine its legal consequences—as well as the District Court, and, of course, this Court is in the same position. In such circumstances, there is no reason to accord weight to the District Court's conclusion on what is, in the last analysis, a question of statutory interpretation.[13]

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[11] "The question involved is mainly one of law" (R. 26).

[12] The same is true of the dissenting opinion in the court of appeals (R. 64-67).

[13] As to the principle accepted in almost every circuit, with respect to the lesser weight to which a district court's findings are entitled when the evidence is entirely undisputed, see *Orvis* v. *Higgins*, 180 F. 2d 537 (C.A. 2), certiorari denied, 340 U.S. 810; *Bowles* v. *Beatrice Creamery Co.*, 146 F. 2d 774, 780 (C.A. 10); *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. 2d 704, 705-706 (C.A. 3); *Himmel Bros.*

Claimant's product was misbranded while in interstate commerce and held for sale thereafter. Claimant argues that its product has not been shown to be "misbranded when introduced into or while in interstate commerce or while held for sale (whether or not the first sale) after shipment in interstate commerce," as required by Section 304(a). The apparent basis for this contention is that the product was labeled as "imitation" when sold by claimant to wholesalers, by wholesalers to retailers, and by retailers to consumers. Inasmuch as the factors which caused the product to purport to be jam inhered in the article itself apart from the labeling (see pp. 17, 22, *supra*), with the result that it was economically adulterated during the course of the interstate shipment, Section 304(a) would seem clearly to have been satisfied. And whether or not the product purported to be and was represented as jam to intermediate purchasers, there can be no question that it purported to be and was represented as jam for the ultimate consumers to whom it was advertised as jam and who ordered by telephone or who were served the product in restaurants without seeing the label.[14] As to these cus-

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Co. v. *Serrick Corp.*, 122 F. 2d 740, 742 (C.A. 7); *Stewart* v. *Ganey*, 116 F. 2d 1010, 1012-1013 (C.A. 5); *State Farm Mut. Auto. Ins. Co.* v. *Bonacci*, 111 F. 2d 412, 41-415 (C.A. 8); *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279 (C.A. 7); *United States* v. *Mitchell*, 104 F. 2d 343, 346 (C.A. 8); *Equitable Life Assurance Society* v. *Irelan*, 123 F. 2d 462, 464 (C.A. 9); *Sun Insurance Office, Ltd.* v. *Be-Mac Transport Co.*, 132 F. 2d 535, 536 (C.A. 8).

[14] As has been noted (*supra*, p. 7n.), the product represented to be "jellies and preserves" in the Hotel Yucca came from the same "parent lot" as the product seized.

tomers, the misbranding clearly occurred while the product was "held for sale * * * after shipment in interstate commerce."

The *Catsup*, *Poppy Seed*, and *Pop'n Oil* cases in the Second, Sixth and Fifth circuits, discussed at pp. 19-22, *supra*, all hold that products truthfully labeled when sold to dealers, but whose labels are not seen by the ultimate consumer, are misbranded within the reach of Section 304(a). In each of these cases, the product was seized in the container sold to the dealer—which is in fact, of course, the only point at which the adulteration or misbranding can be halted—even though the dealer might not have been deceived. In each case the contention advanced by claimant here was rejected by the court of appeals. See 148 F. 2d at 74, 164 F. 2d at 252, 147 F. 2d at 128. These decisions are therefore all inconsistent with claimant's contention that the requisites of Section 304(a) have not been satisfied in this case.

B. Since Claimant's Product Purports to be Jam, Departure from the Standard of Identity Is Not Warranted Even if the Label be Regarded as Truthful.

Claimant contends that all of the above factors and principles are overbalanced or rendered wholly inapplicable because of the use of the word "imitation" on the label. Since the facts referred to above are not challengeable, this must mean that, as a matter of law, the word "imitation" proves that the product does not purport to be jam—even if some consumers actually think that the product is jam.

There may be reason to doubt that "imitation" is an accurate description of claimant's product. It is not an imitation of jam in the sense that it is a different product made of different ingredients which are combined to produce something that resembles jam. Claimant's product is merely jam of an inferior kind, containing all of the ingredients of jam but with the most expensive in a lesser proportion. It is thus really substandard jam, and exactly the type of product which the provision in the statute for standards of identity was designed to catch. See pp. 68-69 and legislative history, *infra*, pp. 33-53.

But even if it be assumed that "imitation" is a truthful adjective, claimant's position is no better. For the object of Sections 401 and 403(g) was to substitute standardization of the food for informative labeling as a means of consumer protection against subtle economic deception, a protection which is of special significance when the product lends itself to uses in which the consumer has no opportunity to examine the label. For "experience had shown that truthful labeling of a product was no protection to the bulk of the consuming public; if a product gave the appearance of being a certain food, the public assumed that it contained only those ingredients which were commonly associated with that food and the label was never consulted."[15]

The Quaker Oats case establishes that truthful informative labeling does not justify failure to con-

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[15] *United States* v. *306 Cases Containing Sanford Tomato Catsup With Preservative*, 55 F. Supp. 725, 726 (E.D. N.Y.), affirmed, *sub nom. Libby, McNeill & Libby* v. *United States*, 148 F. 2d 71 (C.A. 2), discussed at pp. 19-20, *supra*.

form to standards of identity. That truthful, informative labeling does not satisfy the requirements of Sections 401 and 403(g) is established by this Court's decision in *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, decided in 1943. The Federal Security Administrator had approved standards of identity for "Farina" as meaning the product without vitamins added, and for "Enriched Farina" as meaning farina with a combination of specified vitamins and iron added. No provision was made for a farina enriched only by Vitamin D, and Quaker Oats Company attacked the administrative definition for excluding such a wholesome product when properly labeled. The case thus sharply contrasts with the instant case in one respect—the deviation from the standard product there sought to be approved was a healthful addition, not the substitution of an inferior ingredient, in part, for that customarily used. Nevertheless, in the *Quaker Oats* case, this Court concluded that truthful, informative labeling for a product as to which different standards of identity had been approved would not justify departure from the standards fixed. The following quotation (318 U. S., at 230-231), giving the reasons for this conclusion, on its face is much more clearly applicable to the kind of "economic adulteration" practiced in this case than to the situation in the *Quaker Oats* case itself:

> Both the text and legislative history of the present statute plainly show that its purpose was not confined to a requirement of truthful and informative labeling. False and misleading labeling had been prohibited by the Pure

Food and Drug Act of 1906. But it was found that such a prohibition was inadequate to protect the consumer from "economic adulteration," *by which less expensive ingredients were substituted, or the proportion of more expensive ingredients diminished,* so as to make the product, although not in itself deleterious, inferior to that which the consumer expected to receive when purchasing a product with the name under which it was sold. Sen. Rep. No. 493, 73rd Cong., 2d Sess., p. 10; Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 10. The remedy chosen was not a requirement of informative labeling. Rather it was the purpose to authorize the Administrator to promulgate definitions and standards of identity "under which the integrity of food products can be effectively maintained" (H. R. Rep. 2139, 75th. Cong. 3d Sess., p. 2; H. R. Rep. 2755, 74th Cong. 2d Sess., p. 4), and to require informative labeling only where no such standard had been promulgated, where the food did not purport to comply with a standard, or where the regulations permitted optional ingredients and required their mention on the label. §§ 403 (g), 403(i); see Sen. Rep. No. 361, 74th Cong., 1st Sess., p. 12; Sen. Rep. No. 493, 73d Cong., 2d Sess., pp. 11-12.

The provisions for standards of identity thus reflect a recognition by Congress of the inability of consumers in some cases to determine, solely on the basis of informative labeling, the relative merits of a variety of products superficially resembling each other. * * * [italics supplied]

Section 403(g), unlike 403(h), permits no departure from the standards. The contrast between subsections (g) and (h) of Section 403 also shows that the standards of the former were not to be avoided by truthful labeling. The two subsections implement the consecutive clauses of Section 401, which provide for standards of identity and standards of quality and fill of container. Subsection (h) provides expressly that food which purports to be food for which standards of quality and fill have been prescribed and which falls below such standards shall be misbranded "unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard."[15] Subsection (g), however, provides for no similar method of departing from the standard of identity on condition that the departure be manifested on the label.[16] As the Court recognized in the *Quaker Oats* case, *supra,* the latter section was concerned with maintaining "the integrity of food products," not with "informative labeling."

The purpose of requiring standards of identity would be defeated if substandard products may be sold if labeled "imitation." The *Quaker Oats* case (as well as the legislative history referred to at

[16] As is pointed out at pp. 35-37, *infra*, Section 403(g) was based in part upon the Butter Standard Act of 1923 (42 Stat. 1500, 21 U.S.C. 321a), which defined the minimum percent of milk fat to be contained in butter without any regard for labeling. In contrast, Section 403(h) was derived from the 1930 McNary-Mapes amendment (Act of July 8, 1930, 46 Stat. 1019), to the Food and Drug Act of 1906, which authorized the promulgation of standards of quality, condition, and fill of container for canned foods but allowed the labeling to indicate that the food fell below the prescribed standard.

pages 34-53, *infra*) shows that the purpose of t provisions for standards of identity was two-fo (1) to protect the consumer against econom adulteration by which ingredients customarily us are replaced by inferior, less expensive, ingred ents, and (2) to prevent the confusion of consu ers which results when various combinations of i gredients are permissible. Both of these objec would be frustrated if substandard products cou be sold so long as they were labeled "imitation".

(1) The finding of the Administrator in suppo of the regulations fixing standards for jam sho that an object was to prevent deception of the co sumers through the use of "abnormally large qua tities of pectin or acid" which enables "a substa tial part of the normal fruit content of preser to be replaced by water and excessive saccharin ingredients." (Finding 40, 5 Fed. Reg. 35 (1940).) "Such a product," the finding continu "through its consistency and appearance, purpor to be preserve and such use of pectin and acid is r garded as deceptive." This finding was direct at the very type of economic adulteration whi the claimant here is practicing.

If claimant's contention is correct, it will be po sible for food manufacturers to avoid complian with the standard of identity referred to in Se tion 403(g) by using the adjective "imitation" connection with any inferior or substandard pro uct. Although a manufacturer might hesitate use this device for foods sold in retail stores, the would be no reason for hesitancy with respect foods which eventually reach the ultimate co sumer in such a manner that he cannot see t

labeled container. This would be true not only as to almost all food sold in public eating places, such as hotels, restaurants and soda fountains, but as to products which become an ingredient in locally produced articles such as pies and cakes. As to such foods the consuming public never sees the labels and would have no means of knowing that the local distributor was foisting an inferior product upon it. It would be futile from a consumer's standpoint to establish standards of identity for foods of this type if addition of the adjective "imitation" allowed an inferior substitute legally to replace the standardized article.

(2) If manufacturers can escape the standard of identity merely by labeling a product which does not conform to the standard as "imitation," the consequence would also be to recreate the confusion which the standard was intended to eliminate. In the instant case, preserve or jam is defined as a product containing 45 parts or more of fruit to 55 parts of saccharine ingredients. One manufacturer might produce "imitation" jam with 40 parts of fruit, another with 35, another with 30, 29, 19, or 9—or any other figure less than 25—each as lawfully as claimant, for whom the proportion was 25. The truthful statement of percentages on the label would not avoid consumer confusion any more than in the *Quaker Oats* case. Purchasers either would not read or would not be aware of the significance of the statistics as to the ingredients. The prefix "imitation" would not prevent confusion for substandard jams of varying grades any more than would the word "jam" for the standard product.

C. The Legislative History of the Act, Read as a Whole, Shows That Congress Intended the Standards of Identity to Prevent the Cheapening of Foods, and Jam in Particular, Through the Substitution of Inferior Ingredients.

The majority and minority of the court below each relied on portions of the legislative history to support the positions taken. There are statements in the committee reports and the hearings which indicate both that Congress was intending to reach the precise product involved in this case— jam with one-half the customary fruit content but labeled as something else— and to the effect that no wholesome food was being proscribed. If these latter remarks can be read as referring to more than a truly distinctive food, as compared with a variation of a standard food product, they are inconsistent with other statements from the same sources, and their authority has been destroyed by the *Quaker Oats* decision. For in that case, the Court said, in answer to a similar argument (318 U.S., at 232):

> * * * We must reject at the outset the argument earnestly pressed upon us that the statute does not contemplate a regulation excluding a wholesome and beneficial ingredient from the definition and standard of identity of a food. The statutory purpose to fix a definition of identity of an article of food sold under its common or usual name would be defeated if producers were free to add ingredients, however wholesome, which are not within the defi-

> nition. As we have seen, the legislative history of the statute manifests the purpose of Congress to substitute, for informative labeling, standards of identity of a food, sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive. In many instances, like the present, that purpose could be achieved only if the definition of identity specified the number, names and proportions of ingredients, however wholesome other combinations might be. * * *

The history and background of the standard of identity provision, read as a whole, supports the view that the mere wholesomeness of a properly labeled variation from the standard of identity does not justify departure from the standard. The need for standards of identity arose out of the difficulties of enforcing the provisions of the 1906 Act, forbidding "economic adulteration,"—"the cheapening of foods either through lessening the quantities of valuable constituents or through the substitution of cheaper constituents." (S. Rep. 646, 74th Cong., 1st Sess., p. 4; Dunn, p. 480.[17])

Even prior to 1906, Congress authorized the Secretary of Agriculture to establish "standards of purity" for food products "for the guidance of the officials of the various States and of the courts of justice." Act of June 3, 1902, 32 Stat. 286, 296.

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[17] The legislative history of the Federal Food, Drug, and Cosmetic Act is collected in Dunn, *Federal Food, Drug, and Cosmetic Act* (1938), hereinafter referred to merely as Dunn.

These advisory standards were not binding on anyone. The result was that in attempting to prove adulteration, the Government first had to show that the advisory standard did in fact "represent the actual composition of the product expected by the consumer and recognized by the majority of the trade," and then that the food on trial did not comply with the standard.[18] The difficulty in adducing proof as to general understanding in each case handicapped enforcement and left at "a distinct disadvantage * * * ethical manufacturers who are forced to compete with products which differ from the advisory standards."[19]

In 1923, in order to alleviate this situation as to butter, Congress passed the Butter Standard Act (42 Stat. 1500, 21 U.S.C. 321a), which provided a definite standard for butter—80% milk fat—with no proviso for variations depending on labeling. This was the forerunner of the standard of identity provision of the present law. (See passage quoted immediately below.)

The need for making standards of identity mandatory was described in the Senate Committee Report in a predecessor to the bill which became the Food, Drug, and Cosmetic Act as follows (S. Rep. 361, 74th Cong., 1st Sess., p. 10, Dunn, pp. 245-246):

> The absence of definitions and standards of identity has seriously handicapped the effec-

[18] Annual Report of the Food and Drug Administration for the Fiscal Year ending June 30, 1933, p. 14, Dunn, pp. 27-28.

[19] *Ibid.*

tive operation of the present law in maintaining the integrity of our food supply. The provisions of the present law, as well as those of this bill, dealing with so-called "economic adulteration", that is, the cheapening of foods either through lessening the quantities of valuable constituents or through the substitution of cheaper constituents, require definitions and standards whereby the article can be judged. For example, under the present law, and under the bill, a food is defined as adulterated if any substance has been mixed or packed with it so as to reduce its quality or strength, or if any substance has been substituted wholly or in part therefor. These provisions in themselves imply the existence of definitions and standards of identity, since no one can tell when an article is adulterated under them without first determining definitely what constitutes the unadulterated product.

In the absence of a standard for butter there existed, before Congress acted, a most chaotic condition in the sale of this commodity. Butter was found on the market with a fat content varying from about 66 to 85 percent or more. Some manufacturers deliberately worked water into their product, thus obtaining butter prices for water and at the same time curtailing the market for the dairy-farmers' butterfat. The passage of the definition and standard of identity for butter cleared up this chaotic condition to the advantage of producers of milk fat and of manufacturers, distributors, and consumers of butter. Any

> product which does not meet the definition of source, or which falls below the 80-percent fat prescribed, can no longer be sold as butter. Conditions similar to those which prevailed with respect to butter exist today with many other food commodities and can be corrected only by the action here authorized. * * * [T]his will be particularly true of manufactured products composed or two or more ingredients or different values * * *.

See to the same effect the earlier Committee Report in the 73rd Congress (S. Rep. 493, 73d Cong. 2d Sess., p. 10, Dunn, pp. 118-119).

Clearly, jam, which is ordinarily composed of approximately one-half fruit, an expensive ingredient, and one-half of cheaper materials, was the very type of product which Congress had in mind. Indeed, the history of the statute shows that the article principally discussed was a substandard jam of almost the precise composition as the claimant's product here, containing one-half of the amount of fruit customarily found in jam.[20] This product was labeled Bred Spred. The Government brought several unsuccessful actions against that product, claiming that it was "mixed * * * in a manner whereby damage or inferiority is concealed," in violation of Section 8 of the Food and Drug Act of 1906. In *United States* v. *10 Cases, More or Less, Bred Spred,* 49 F. 2d 87, the Court of

[20] Claimant has conceded that "no decision was as strongly stressed by the Food and Drug Administration to show the need for revision of the 1906 Act as the so-called *Bred Spred* case." (Br. p. 15).

Appeals for the Eighth Circuit held that inferiority had not been proved, saying (49 F. 2d at 90):

> * * * The word "inferiority" in the statute raises the question, What is the other member of the comparison? Or, in other words, the question, Inferior to what? * * * The mere fact that the product contained fewer strawberries than some other product, e.g., jam, does not show that Bred Spred was inferior to jam; nor does it show that a comparison with jam was called for by the statute unless Bred Spred was being palmed off on the public as jam. No showing of this kind was made.

In *United States* v. *49-1/2 Cases of Bred Spred*, E. D. Mich., 1927, reported only in White and Gates, *Decisions of Courts in Cases under the Federal Food and Drugs Act* (U. S. Department of Agriculture, 1934, p. 1204), District Judge Simons reached the same conclusion on the basis of the distinctive-name proviso in the 1906 Act, which exempted from the prohibition against adulteration and misbranding mixtures sold "under their own distinctive names" and not deleterious to health.[21]

[21] The proviso in Section 8 of the Food and Drug Act of 1906, 34 Stat. 770, reads as follows:

> *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:
>
> First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an

The Bred Spred litigation was referred to before Congress in connection with two proposed changes in the law: The need for binding standards of identity in order to avoid economic adulteration and the elimination of the "distinctive name" proviso.[22] The attention of the Congress was first called to Bred Spred in connection with the latter provision, when Mr. Campbell, the Chief of the Food and Drug Administration, referred to it during the Senate hearings in the 73d Congress in 1934. Both because his testimony relates to the very type of product here involved and because both parties rely on portions of it, we set it forth at length so that the Court may see the complete picture. He testified:[23]

> MR. CAMPBELL. * * *
>
> The litigation was based upon a product known as "Bredspred." It is an article that contains the ingredients of a preserve for which there is a more or less universally widespread understanding of the composition. The housewife ordinarily employs a pound of fruit and a pound of sugar and cooks these ingre-

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imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

[22] Claimant's treatment of the *Bred Spred* case as involving *only* the distinctive name proviso (Br. p. 16) disregards the real ground of the decision in the Eighth Circuit, and the importance of the case as showing the need for standards of identity to prevent the marketing of sub-standard foods.

[23] Hearings on S. 2800, 73d Cong., 2d Sess., 1934, pp. 512-514, Dunn, pp. 1122-4.

dients to the consistency of a jam or of a preserve. That product is popularly marketed in glass containers of a cylindrical character.

There was a product put on the market containing half the amount of fruit understood by the consumer to be in preserves, and half the amount adopted by manufacturers generally, thereby establishing a trade custom as to the proper proportion between fruit and sugar. This product was labeled "Bredspred." It was not sold as preserves, so far as any declaration on the label would indicate, it was sold purely as "Bredspred", under a distinctive name. The product on the retail shelf, however, was delivered repeatedly to consumers who called for jam or for preserves. It sold at a price so slightly below the standard quotations for the standard product that there was no indication to the consumer of the difference between the product "Bredspred" and the product "preserves."

* * * *

* * * There are a great many products that are sold under distinctive names. There can be no objection to the sale of a product that is not of a common character, that doesn't possess, perhaps, appearances of a common article under its own distinctive name, provided sufficient information about it is disclosed so that deception is not involved.

* * * *

Senator WHITE. May I ask what is the specific deception that you complain of in connec-

tion with that? Do you claim that there is not enough fruit matter in it, in the proportion that the public understands?

Mr. CAMPBELL. Yes; the expensive ingredient in jam or the preserve is the fruit. There is always a tendency to chisel by the reduction of that, and a corresponding increase of the sugar, or some substitute for the fruit.

* * * *

* * * the housewife understands that the preserves or jams are made from the use of a pound of fruit and a pound of sugar, approximately that, properly cooked to a certain consistency.

Senator COPELAND. "Cup for cup" is the phrase, isn't it?

Mr. CAMPBELL. Exactly. Where half the amount of fruit is used, you can see not only the deception, the cheating that is involved, so far as the purchaser is concerned, but likewise the difficulty to the farmer who grows the fruit that is utilized in this way.

Senator MURPHY. The effect is it decreases the standards and admits unfair competition to legitimate purchasers of fruit?

Mr. CAMPBELL. Quite right, sir.

Senator OVERTON. Is that "Bredspred" up to the standard of "bread-spread"?

Mr. CAMPBELL. Yes; whatever the standard of breadspread is, Senator.

Senator OVERTON. Now, as I understand, that is used in place of preserves.

Mr. CAMPBELL. Used as a preserve.

Senator OVERTON. It is not labeled a "Preserve"?

Mr. CAMPBELL. No, sir. That is the point. It is not labeled a "preserve."

Senator OVERTON. But it is sold as a preserve, and used as a preserve?

Mr. CAMPBELL. Exactly.

Senator OVERTON. Under another name?

Mr. CAMPBELL. That is right.

Senator OVERTON. There would be no objection to it if it were labeled a "preserve"?

Mr. CAMPBELL. If it were labeled a "preserve" it would be a violation of the law, and we would instantly proceed against it, but not being labeled "preserve", being labeled under its own distinctive name, it takes advantage of the proviso in the existing act which makes it possible to impose on the public and exploit it indefinitely. * * *

In the hearings before the House Committee during the 74th Congress,[24] Mr. Campbell referred to the Bred Spred situation as illustrative of the need for standards of identity. He stated:

Mr. CAMPBELL. * * * *

We have no legal food standards at the present time. The only basis on which we operate is common-law standards. But I read to you the provisions defining adulteration of food which contemplate the preservation of the integrity of the product and therefore do imply

[24] House Hearings on S. 5, 74th Cong., 1st Sess., 1935, pp. 46-47, Dunn, 1238-1239.

the existence of standards. And if there is one standard that can be effectively established as a common-law proposition it is that of preserves. It is a product that has been made in the home since time immemorial. One pound of fruit and a pound of sugar cooked to a definite consistency make preserves. That has been the common-law standard or the trade custom on the part of manufacturers throughout time.

But here is a product that looks like raspberry preserves. It tastes like raspberry preserves. It is a raspberry product. It contains only one-half of the fruit that is required under this common-law standard. Now, the advantage to a manufacturer in putting out an article of this sort, when you take into account that the costly ingredient is the fruit, as a mere competitive proposition, is instantly obvious. The extent to which it is an imposition on the consumer in purchasing that article in the belief that it had its full complement of fruit is likewise obvious.

But that product is not labeled as a preserve. It is labeled as bread spread. But, as a matter of actual commercial practice, purchasers of preserves, going into a retail store and calling for preserves, were handed this time out of mind, and it sold for almost the price that standard preserves sold for.

Mr. KENNEY. What is the other ingredients besides the fruit?

Mr. CAMPBELL. There is fruit, sugar, and a pectinous material acquired from fruit, which

is just a gelatinizing agent, that enables you to incorporate large quantities of water, all in lieu of the one-fourth amount of fruit deficient in that product as compared with the standard preserve. So that water and pectin have been substituted.

Mr. KENNEY. So that you find watered stock even in preserves.

Mr. CAMPBELL. Water is the most prevalent and cheapest of all adulterants.

Mr. CHAPMAN. What effect would the provision of Senate 5 have on the manufacture and sale of a product like that?

Mr. CAMPBELL. Senate 5 provides for standards. That product would be a substandard article and its marketing as a preserve would be proscribed.

Then follows a passage suggesting, contrary to the subsequent holding in the *Quaker Oats* case, (see pp. 33-34, *supra*) that if the product were wholesome and properly labeled, it would be unobjectionable under the statute.[25]

Mr. CAMPBELL. It would have to be shown on the label just what it was, and enable the consumer to buy it for what it was.

There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for what it is, without deception, should be permitted the channels of commerce. There can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying.

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[25] Dunn, p. 1239.

There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it.

Mr. Campbell continued to explain his views as to the meaning of the standard of identity provision as follows:[26]

Mr. CAMPBELL. * * *

So an answer to the question how to prevent the incorporation of improper or excessive quantities of water in food products, and to eliminate the cheat that results from the sale of water at the price of food, is the provision for a legal standard for food. I do not know of any other way by which it can be done.

Mr. CHAPMAN. In other words, I understand, in taking Mr. Kenney's original illustration, if a man wants to buy cider which is 1 part cider and 2 parts water, he will have the privilege of doing that, but he will know what he is doing?

Mr. CAMPBELL. That is quite right; but if it is sold only as cider, it must have only the quantity of water that the standard permits.

Again, with reference to Bred Spred, Mr. Campbell stated:[27]

Mr. CAMPBELL. * * *

The court held that this product was sold under its own distinctive name, and that, notwithstanding the fact that we had introduced

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[26] Dunn, pp. 1242-43.

[27] Dunn, pp. 1244-46.

witnesses to show that the product was sold by retailers to consumers as preserves, the law was not violated. Our point was that the use of a distinctive name, such as "bread spread", with a package looking like preserves, did not remove the product actually from the field of preserves, and that the distinctive name proviso did not apply. That was our argument.

The court held that our reasoning was faulty, and notwithstanding the various abuses, the manufacturer was within his legal rights in putting this type of product on the market. The fault was the weakness of the law itself.

Mr. COLE. What abuse is there?

Mr. CAMPBELL. The abuse of the sale of the product as preserves, and the understanding by the consumer that it is preserves, when it is an article that carries half of the amount of fruit that it should carry, and fruit is the expensive ingredient. The consumer pays practically the price he would pay for standard preserves and is paying the price of preserves for the water.

* * * * * *

Mr. CAMPBELL. * * * If there is a provision of the act for the promulgation of a legal standard, that would mean that any product sold as a preserve must comply with that standard.

Then, if a product containing one-half fruit and one-half water or some other ingredient were to be sold, and sold not as a preserve but sold as a bread spread, in order to prevent its

purchase by the consumer and its sale by the retailer as a preserve—something that actually took place in this instance—there should be a requirement that the ingredients be indicated and a statement made that the product does not comply with the standard.

* * * * * * *

Mr. CAMPBELL. It is bread spread; but are there not circumstances that will lead the consumer to the conclusion that this article is sold entirely and distinctly as preserves? Is there not an abuse existing there? Is there not an actual deception? Is not there a genuine imposition on consumers in the purchase of an article in the belief that it is preserves? You would not recognize the deficiency in fruit, in all probability, if you bought it and ate it.

Is there not a misleading impression created by all of the circumstances, which are in nowise effectively removed by resort to a mere name, "Bread Spread."

To my mind, the term "bread spread" is nothing more nor less than a trade mark under which this firm sells its preserves. That would be my impression.

Subsequently, the House Committee Report in 1938 used the difficulty of maintaining standards for jam as an example of what standards of identity would accomplish, saying:[28]

Section 401 provides much needed authority for the establishment of definitions and stand-

[28] House Report 2139, 75th Cong., 3d Sess., 1938, p. 5, Dunn, p. 819.

ards of identity and reasonable standards of quality and fill of container for food. One great weakness in the present food and drugs law is the absence of authoritative definitions and standards of identity except in the case of butter and some canned foods. The Government repeatedly has had difficulty in holding such articles as *commercial jams and preserves* and many other foods to the time-honored standards employed by housewives and reputable manufacturers. *The housewife makes preserves by using equal parts of fruit and sugar. The fruit is the expensive ingredient, and there has been a tendency on the part of some manufacturers to use less and less fruit and more and more sugar.*

The Government has recently lost several cases[29] where such stretching in fruit was involved because the courts held that the well-established standard of the home, followed also by the great bulk of manufacturers, is not legally binding under existing law. By authorizing the establishment of definitions and standards of identity this bill meets the demands of legitimate industry and will effectively prevent the chiseling operations of the small minority of manufacturers, will, in many cases expand the market for agricultural products, particularly for fruits, and finally will insure fair dealing in the interest of the consumer. [Italics supplied.]

[29] The cases mentioned were principally the *Bred Spred* cases referred to in the committee hearings.

It is thus plain that the need for standards to prevent the dilution of the percentage of fruit in jam was the example which Congress had primarily before it when it approved Sections 401 and 403(g). And what it sought to prevent was not merely the substitution of cheaper products for fruit, but the marketing of the substandard jam thus created under a different name, such as Bred Spred, which was not believed to save the consumer from deception and confusion. The very result which Congress sought to avert through the fixing of standards would reappear if exactly the same product, looking and tasting like jam, could be marketed by calling it "imitation" jam instead of Bred Spred. Certainly on the facts of this case, in which the product looks and tastes like jam and is often consumed or purchased in the belief that it is jam, we have the precise situation with which Congress was attempting to deal.

It is true, as has already been indicated, that there are statements in the legislative history which imply that the standards provision was not meant to prohibit the distribution of wholesome foods truthfully labelled. But we believe that all that was meant by these remarks was that *distinctive foods* were not to be suppressed, not that substandard brands of recognized foods were to be protected so long as they bore a *distinctive name*.

The testimony of Mr. Campbell before the Senate and House Committees, already quoted at length at pp. 39-47, *supra*, contains statements which look both ways on this, although, as has been

noted, he was seeking to outlaw the very type of product involved in the case at bar.[30]

The committee reports, however, show a shift in emphasis from general statements that wholesome foods were not to be interfered with to the simple comment that standards of identity shall not apply

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[30] The following statements seem to mean that only wholesome products which were distinctive foods were not to be barred by the standards of identity:

"There are a great many products that are sold under distinctive names. There can be no objection to the sale of a product that is not of a common character, that doesn't possess, perhaps, appearances of a common article under its own distinctive name, provided sufficient information about it is disclosed so that deception is not involved." [Dunn, p. 1123.]

"Senate 5 provides for standards. That product would be a sub-standard article and its marketing as a preserve would be proscribed." [Dunn, p. 1239.]

"It is bread spread; but are there not circumstances that will lead the consumer to the conclusion that this article is sold entirely and distinctly as preserves? Is there not an abuse existing there? Is there not an actual deception? Is there not a genuine imposition on consumers in the purchase of an article in the belief that it is preserves? You would not recognize the deficiency in fruit, in all probability, if you bought it and ate it.

"Is there not a misleading impression created by all of the circumstances, which are in nowise effectively removed by resort to a mere name, 'Bread Spread.'

"To my mind, the term 'bread spread' is nothing more or less than a trade mark under which this firm sells its preserves. That would be my impression." [Dunn, pp. 1245-6.]

The following statements suggest that no wholesome, truthfully labelled product could be prohibited:

"It would have to be shown on the label just what it was, and enable the consumer to buy it for what it was.

"There can be no objection to the philosophy that any article that is wholesome and has food value and is sold for

to "distinctive" foods. The first Senate Report, No. 493, in the 73d Congress in 1934, contained the following language quoted by claimant:[31]

> It should be noted that the operation of this provision will in no way interfere with the marketing of any food which is wholesome but which does not meet the definition and standard, or for which no definition and standard have been provided; but if an article is sold under a name for which a definition and standard have been provided it must conform to the

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what it is, without deception, should be permitted the channels of commerce. There can be no objection to that article with its deficiency of fruit if every consumer knows exactly what he is buying.

"There can be no objection to the sale of skimmed milk if the buyer knows that it is skimmed milk when he is buying it." [Dunn, p. 1239.]

"In other words, I understand, in taking Mr. Kenney's original illustration, if a man wants to buy cider which is 1 part cider and 2 parts water, he will have the privilege of doing that, but he will know what he is doing?

"That is quite right; but if it is sold only as cider, it must have only the quantity of water that the standard permits." [Dunn, p. 1243.]

"If there is a provision of the act for the promulgation of a legal standard, that would mean that any product sold as a preserve must comply with that standard.

"Then, if a product containing one-half fruit and one-half water or some other ingredient were to be sold, and sold not as a preserve but sold as a bread spread, in order to prevent its purchase by the consumer and its sale by the retailer as a preserve—something that actually took place in this instance—there should be a requirement that the ingredients be indicated and a statement made that the product does not comply with the standard." [Dunn, p. 1245.]

[31] Dunn, 119-20.

regulation. This does not preclude the use of distinctive individual brands.

The second Senate Report, No. 361, 74th Congress, in March, 1935,[32] was in many respects identical to the 1934 report. It repeated the language just quoted, but significantly added the following:

> * * * But the loophole afforded the dishonest manufacturer by the so-called "distinctive name" proviso of the present law will be closed. Under that proviso adulterated and imitation products sold under such names were immune from action. *It is not intended that the authorization to make standards of identity shall apply to foods which are truly proprietary, that is, foods distinctive in content as well as in name, in the manufacture of which some person or concern has exclusive proprietary rights.* [Italics supplied]

The sentences added show that the prior reference to wholesome food did not include adulterated or imitation brands of recognized foods, and that only "foods distinctive in content as well as in name" were not to be required to comply with standards of identity. On May 22, 1935, the Senate Committee submitted a substitute report, No. 646, 74th Congress, in lieu of Report No. 361.[32a]

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[32] Dunn, 244-47.

[32a] 79 Cong. Rec. 7963, Dunn, pp. 476, 480. Except for the 1938 House Report quoted at pp. 46-47, *supra*, the committee reports and debates after 1935 merely summarize the content of the pertinent statutory provisions without discussion. See, particularly, H. Rep. No. 2755, 74th Cong., 2d Sess., Dunn, pp. 550, 553; S. Rep. No. 91, 75th Cong., 1st Sess., Dunn, pp. 675, 679; S. Rep. No. 152, 75th Cong., 1st Sess., Dunn, pp. 686, 690; 81 Cong. Rec. 1962, Dunn, p. 693.

This report completely omitted all of the passage quoted from the two preceding reports, except the last sentence above (printed in italics), which refers only to "foods distinctive in content as well as in name".

These changes though unexplained, cannot be treated as unimportant. They probably reflect further consideration of the problem and a realization that the passage as originally written did not accurately reflect the purpose of the provision for standards of identity, one object of which, as we have seen, was to overcome the *Bred Spred* case. The final version of this passage in the Senate Committee reports shows that Congress meant to immunize from the standards of identity only separate and distinct food products.[33] Such an interpretation of the statute, but not one which would exempt from the standards of identity all wholesome but inferior variations of standard foods, is consistent with the basic purpose of providing standards of identity and with this Court's decision in the *Quaker Oats* case.

Here we do not have a distinctive food but so-called "imitation jam" which is nothing more than jam, with a reduced proportion of the most valuable ingredient. We think that there can be no doubt that Section 403(g) was meant to reach a product such as is here involved, irrespective of the label.

In sum, (1) claimant's product purports to be jam within the meaning of the language of Section 403(g); (2) the section is not inapplicable even if the jam be regarded as a truthfully labeled and

[33] E. g. Worcestershire sauce, shredded wheat, chili sauce (cf. catsup).

wholesome product; (3) to permit its sale as imitation jam would be inconsistent with the congressional purpose to prevent consumer deception and confusion; and (4) the legislative history, though not always with complete consistency, manifests an intention that Section 403(g) was meant to reach this type of product.

II

Claimant's Product Is Not Exempted From Section 403(g) by the "Imitation" Proviso in Section 403(c)

Section 403(c) of the Food, Drugs and Cosmetic Act provides that—

> A food shall be deemed to be misbranded—
> * * *
> (c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

The District Court was of the view that the case was controlled by this subsection, that if claimant's food was labeled "imitation" so as not to violate Section 403(c), it could not be unlawful under Section 403(g) (R. 26-27). The Court of Appeals, on the other hand, regarded Section 403(g) as the decisive statutory provision, and found that a substandard jam was not an imitation jam but a product purporting to be fruit jam within the meaning of that provision.

We submit that the Court of Appeals was correct. The language of the statute, its history and structure show that compliance with Section 403(c)—or any other subsection of Section 403—

does not make it unnecessary to comply with other subsections, including Section 403(g). Neither subsection need be read as superseding or impliedly repealing the other, but each is to be treated as containing an independent prohibition to be enforced in conformity with its terms.

A. The Language of the Act in Contrast With the 1906 Act.

In the first place, Section 403(g) contains no exception for food complying with Section 403(e), or any other provision of the Act. It does not provide that it will not be violated if a product not conforming to the standard but purporting to be a standardized food is labeled "imitation" in prominent lettering. Nor does Section 403(e) purport to exempt products labeled imitation from any other statutory requirement. It states merely that a food which "is an imitation" shall be deemed misbranded "unless its label bears * * * the word 'imitation'" in equal size and prominence with the name of the food imitated. The District Court and the dissenting judge below—and claimant—mistakenly read Section 403(e) as if it contained an affirmative grant of approval to imitations properly labeled. But the "unless" clause is only a limitation upon, or exception from, the negative—the prohibition—found in Section 403(e) itself. It has no reference to and does not except from any other part of the statute.

Claimant mistakenly asserts (Br. p. 13) that "the statute plainly and without qualification states that such 'imitation jam' shall not be deemed misbranded." But this misreads the "unless" clause, which on its face only bars a charge of misbranding under Section 403(e), and does not re-

late to misbranding as defined by Section 403(g), or any other subsection of Section 403.

Claimant's argument both disregards the language of the 1938 Act and the contrast between the "unless" clause in Section 403(c) and the sweeping exemption for products labeled imitation in the 1906 Food and Drug Act. Section 7 of the earlier statute provided that food and drugs should be deemed adulterated for any one of a number of enumerated reasons, and Section 8 contained a similar enumeration for misbranding. Section 8, however, also contained the following provisions:

> That for the purpose of this act an article shall also be deemed to be misbranded:
>
> * * *
>
> In the case of food:
>
> First. If it be an imitation of or offered for sale under the distinctive name of another article.
>
> * * *
>
> Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided*, That an article of food which does not contain any added poisonous or deleterious ingredients *shall not be deemed to be adulterated or misbranded* in the following cases:
>
> * * *
>
> Second. *In the case of articles labeled*, branded, or tagged *so as to plainly indicate that they* are compounds, *imitations*, or blends,

> *and the word* "compound," "*imitation*," or "blend," as the case may be, *is plainly stated on the package* in which it is offered for sale: * * * [Italics supplied.]

The proviso permitting the marketing of an imitation if so labeled on its face exempted such products from all of the adulteration and misbranding provisions of Sections 7 and 8 so long as the food was not harmful; the exemption was not merely from the particular paragraph to which the proviso is attached.

Comparison of the 1906 Act with the 1938 Act discloses that the proviso in the former was transferred to the "imitation" subsection, and reduced in scope from an exemption from all the misbranding and adulteration provisions to an exemption from the "imitation" subsection alone. This narrowing of the effect of the proviso, which, though unexplained, must have been deliberate, shows that the "unless" clause cannot have the effect claimant would give it here. For claimant's argument[34] makes it an exception to the other subsections—just as it was before—and not to the single clause to which it was transferred and confined. To paraphrase what was said in *United States* v. *Walsh*, 331 U. S. 432, 437, with respect to another provision of the Act, it is "impossible to say that the framers of the 1938 Act" narrowed the content of the exception for prominently labeled imitations "for the useless purpose of achieving the

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[34] Claimant's statement (Br. p. 16) that the "imitation exemption" of the 1906 Act "was carried over to the 1938 Act as Section 403(c)" fails to recognize that the exemption was so narrowed as no longer to apply to this case. The statement on pages 18-19 of claimant's brief contains the same error.

same result as had been reached under the 1906 Act" with the language which Congress changed.

B. The Structure of Section 403 Shows Independence of the Subsections.

The structure of Section 403 demonstrates that the various subsections defining different types of misbranding are independent. Each subsection defines a different method of misbranding. Certainly a product whose labeling was "false or misleading" in violation of Section 403(a) or whose container was so made as to be misleading (Section 403(d)), or which, if not subject to the standards of identity required by Section 403(g), was so labeled as not to disclose all the names of ingredients (Section 403(i)), could not escape condemnation because it was labeled "imitation" so as not to violate Section 403(c). Subsection (g) is neither more related to nor dependent upon subsection (c) than are any of these subsections.

Many of the subsections contain "unless" clauses similar to that in subsection (c). See Section 403 (c), (e), (g), (h), (i), (j), (k). Each of these clauses defines situations to which the prohibition in the same subsection is inapplicable. None of them purports to exempt the situations described from the other subsections. Thus subsection (k) provides that a food is misbranded "if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, *unless it bears labeling stating that fact*". [Italics supplied] Nevertheless, catsup containing a preservative and labeled so as to disclose that fact, and therefore not in violation of subsection (k), was found to be in violation of subsection (g) because not in conformance with the standard of identity. *Libby,*

McNeill & Libby v. *United States*, 148 F. 2d 71 (C. A. 2), discussed *supra*, pp. 19-20. The same would clearly be true as to food "represented for special dietary uses" but accurately labeled and therefore not in violation of subsection (j) and of food for which standards of quality or fill had been fixed, but accurately labeled and therefore not in violation of subsection (h). No such product could escape compliance with standards of identity prescribed under Section 401 and enforced by Section 403(g) by reason of their failure to violate these other subsections. Subsection (c) stands in no different position.

In a converse situation the Court of Appeals for the Eighth Circuit held that Section 403(c) was independent of the provision for standards of identity, so that compliance with the latter would not necessarily immunize a product from the former. In *Land O'Lakes Creameries* v. *McNutt*, 132 F. 2d 653, the order fixing standards of identity for oleomargarine was challenged by butter manufacturers on the ground that it was repugnant to subsection (c) since it did not require oleo to be labeled imitation butter. As one reason for rejecting this contention, the court pointed out that Section 403(c) and Section 401, providing for standards of identity, were "independent", saying (132 F. 2d 659):

> But if § 403(c) requires that oleomargarine containing the optional ingredients specified in the standard ! labelled "imitation butter," it is our opinion that the respondent's order cannot be invalidated for that reason, *because we regard § 403(c) as independent of § 401.* If § 403(c) imposed the duty upon the re-

spondent to require all oleomargarine containing the ingredients designated in the standard as optional, to be labelled "imitation butter," that duty existed both before and after the order was made, since the order does not impair, or purport to impair, the effectiveness of § 403(c). The order establishes a definition of a food product, and is not a license, to those who produce it, to violate any state or federal labelling requirements. [Italics supplied.]

C. Judicial Interpretation of Similar Provisions of the 1906 Act as Independent.

It is also of significance that this Court had previously construed the section of the 1906 statute which enumerated different kinds of misbranding as stating independent offenses. Thus, in *Weeks* v. *United States*, 245 U. S. 618, the Court rejected the argument that because the ingredients of an article were accurately stated on the label, in compliance with the first paragraph of Section 8 of the 1906 Act, the article could not be misbranded under another subsection of Section 8 because "offered for sale under the distinctive name of another article". The Court stated in this connection (245 U. S. at 621-622):

> It is apparent that the statute specifies and defines at least two kinds of misbranding,—one where the article bears a false or misleading label, and the other where it is offered for sale under the distinctive name of another article. The two are quite distinct, a deceptive label being an essential element of one,

but not of the other. No doubt both involve a measure of deception, but they differ in respect of the mode in which it is practiced. Evidently each is intended to cover a field of its own, for otherwise there would be no occasion for specifying and defining both.

The Court had similarly held that the adulteration and misbranding provisions of the 1906 Act were independent, saying that a product accurately branded could nevertheless be found to violate the adulteration section. In *United States* v. *Coca Cola Co.*, 241 U. S. 265, 278, the Court pointed out:

> 'Adulteration' is not to be confused with 'misbranding.' The fact that the provisions as to the latter require a statement of certain substances if contained in an article of food, in order to avoid 'misbranding' does not limit the explicit provisions of § 7 as to adulteration. Both provisions are operative. Had it been the intention of Congress to confine its definition of adulteration to the introduction of the particular substances specified in the section as to misbranding, it cannot be doubted that this would have been stated, but Congress gave a broader description of ingredients in defining 'adulteration.'

These cases are plainly in point, since claimant is contending here that because its product is labeled so as not to violate the imitation provision in Section 403(c) it cannot be found to violate Section 403(g) which, though found in the section dealing with misbranding, actually is con-

cerned with the evil of economic adulteration. See legislative history summarized at pages 33-53, *supra*, and the *Quaker Oats* case. Inasmuch as the structure of the 1938 Act follows that of the 1906 Act in prohibiting a number of separate kinds of misbranding and adulteration, it must be assumed that Congress intended that the judicial interpretation of the older statute as containing independent requirements should be carried over to the new law.

D. Purposes of Standards of Identity Preclude Evasion by Calling Substandard Product "Imitation".

We have pointed out (*supra*, pp. 31-32, 49) that to allow a substandard product, which to consumers would seem to be a kind of jam, to be sold in contravention of the standard of identity fixed for jam under Sections 401 and 403(g) would defeat the purposes of these provisions even if the product were labeled "imitation". One object of those provisions, as the *Quaker Oats* case recognizes, was to eliminate consumer confusion resulting from multitudinous—though not necessarily major—variations in the combinations of ingredients of which a product could be composed. To permit substandard jam to be sold as "imitation jam" would permit the sale of any number of combinations containing less than the 45 parts of fruit required by the standard of identity. See p. 32, *supra*. The other object of requiring standards of identity, as shown by the history of the statutory provision (pp. 28-29, 33-53, *supra*), was to facilitate the enforcement of the prohibition against

economically adulterated or "watered" foods by establishing a standard to which food products would be required to conform. That purpose would be defeated if a product containing a lesser amount of the principal ingredient, but which by reason of its composition, appearance and taste still purported to be the standardized commodity, could be freely sold if the word "imitation" were placed on the label.

The excerpts from the legislative history on which claimant relies, and which have been discussed above, did not suggest that compliance with the requirements of Section 403(c) for imitations would be an exception to Section 403(g). None of these statements related to or even mentioned the imitation provision. The point under discussion was whether compulsory standards of identity would have the effect of preventing the marketing of wholesome, truthfully labeled products. As to this, the controversy as to the meaning of Sections 401 and 403(g) was set to rest by the *Quaker Oats* decision. Nothing in the history of the statute warrants using Section 403(c) as a means of reviving the issue as to the application of the standards of identity to wholesome articles. This would seem particularly true for substandard jam—the product which Congress thought best illustrated the need for binding standards of identity.

E. The Administrative Interpretations.

It is true that during the first few years after passage of the 1938 statute, the Food and Drug Administration, in letters to the trade, sanctioned the use of the word "imitation" on labels of articles

which did not meet the standards of identity. Kleinfeld and Dunn, *Federal Food, Drug, and Cosmetic Act, 1948-1949*, pp. 627-8, 640-1, 712.[35] These interpretations resulted from administrative uncertainty as to how far the new Act went in prohibiting wholesome products, truthfully labeled, which purported to be standard foods.[36] Later, in the *Quaker Oats* case, *supra*, decided in 1943, this Court concluded that Congress deliberately adopted standards of identity as a substitute for informative labeling. It was in reliance upon

[35] The status of this correspondence is decribed by the authors of the compilation cited in the text as follows (p. 561):

> This part sets forth informal opinions rendered by the Food and Drug Administration on many problems which have arisen under the Act. These opinions are excerpts from day-by-day replies to inquiries concerning the application of the statute to specific problems. They represent the attitude of the Administration in the light of the facts submitted and other available information. Thus, the views expressed are subject to modification by the Administration as additional facts may become available and controlling decisions are rendered by the Federal courts.

[36] This uncertainty is reflected in one of the letters, which states (*id.*, at 641):

> This product does not conform with the definition and standard of identity for tomato puree and is therefore misbranded. In view of the silence of the new Act in regard to the status of a food failing to meet the definition and standard of the food it purports to be, we have serious doubt as to the legality of this product, but we believe that if it were legal under any form of labeling it would have to be labeling which designates the product as "Imitation Tomato Puree" in conformity with Section 403(e).

this decision that the Administration reversed its former policy. In 1945 the Administrator specifically rescinded a prior interpretation permitting pineapple preserves not complying with the standards of identity to be sold as imitation pineapple preserves (*id.*, at 746).[37] It should be noted that this clear statement of the Administrator's position with respect to the labeling of preserves as "imitation" was issued four years before the institution of the instant case. There is, therefore, no basis for petitioners' contention that they were misled or trapped by "a swift change" of administrative policy.

We submit that these informal administrative interpretations, abandoned four years before the present proceeding was begun, are not in harmony with the statutory scheme as described in the above pages, nor with the reasoning of this Court in the *Quaker Oats* case. Since the Administrator himself has concluded that the original interpretation was erroneous and has abandoned it, it is no longer entitled to weight. The Administrator has, of course, both the right and duty to reconsider his

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[37] This interpretation reads in part as follows (p. 746):

> Further consideration of the matter in the light of recent court decisions has led us to conclude that products of this type are illegal under any form of labeling. It is not difficult to manufacture pineapple and sugar mixtures so as to contain not less than 68 per cent soluble solids and to otherwise conform to the standard for pineapple preserve in every particular.
>
> On and after May 15, 1945, shipments of such illegal articles will be denied entry. Previously issued administrative opinions which are not in accord with this notice are hereby rescinded.

prior views and to follow what he now believes to be the correct construction of the law. Cf. *Helvering* v. *Reynolds*, 313 U. S. 428, 432; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100-101.

F. The Fact That a Substandard Product Cannot Be Legitimatized by the Insertion on Its Label of the Word "Imitation" or Some Distinctive Name Does Not Render Section 403(c) Meaningless.

Claimant has argued that the decision below, and the Government's construction of the Act, render the "unless" clause for imitations in Section 403(c) meaningless. In this connection, claimant points to Section 502(i), which prohibits the imitation of drug products without exception, and asserts that the contrast between this provision and Section 403(c), which deals with imitation foods, shows that the latter was not to be read as containing an unqualified prohibition. We do not disagree with this conclusion; but with the premise that to construe Section 403(g) as reaching imitations which purport to be foods for which standards of identity have been established, renders the "unless" clause in Section 403(c) meaningless.

Nothing in Section 403(g) can conceivably make the "unless" clause inoperative as to foods for which standards of identity have not been established. This leaves Subsection (c) effective as to a great many foods, such as fresh or dried fruits and vegetables, which are exempted by the statute, meat, fish, poultry, soups, sugar and seasoning, baked goods, confectionery, nuts, fruit juices, marmalade, starches and baking powder, breakfast

cereals (except farina), coffee and tea, vegetable oils, lard and shortenings, canned fruits, pudding and dessert mixes, rice, and flavoring extracts.[38] Conceivably, even where standards have been prescribed, an imitation which so differed from the standardized article as not to "purport" to be that article would not be affected by Section 403(g).[39] In each case a question of fact would be presented —does the "imitation" product, by its taste, appearance, method of distribution, etc., purport to be the standardized article and thereby create the possibilities of consumer deception presented by this case.

But if imitations are not permissible for standardized foods, it is because that result is required by the language of the statute. For the word "purports" in Section 403(g) is broader than and inclusive of the concept embodied in the word "imitation." Claimant has admitted (Br. pp. 23-24) that both words are employed with their ordinary meanings. Something which "stimulat[es] something superior" (claimant's definition of imitation

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[38] Standards of identity have been prescribed only for the following foods as of this date: cacao products; cereal products; macaroni and noodle products; processed milk products and cream; cheeses and cheese products; canned fruits; fruit preserves, jellies and butters; raw oysters and canned oysters; egg products; oleomargarine; canned vegetables; tomato products; salad dressing (21 C. F. R. §§ 14-53, inclusive).

[39] Thus, if a manufacturer distributed a product which tasted like jam but did not look like jam, and sought to sell it in a box which in no way resembled the familiar jar of jam, he might call it "Imitation Jam"—for no one would think such a product was jam.

(Br., p. 24) taken from Webster's Dictionary) would normally purport to be the object simulated. Thus, there is no reason for surprise that the natural effect of Section 403(g) is to leave very little, if any, room for play for the "unless" clause in Section 403(c), in so far as standardized foods are concerned.

We have already noted (p. 27, *supra*), and the court below seemingly held (R. 60), that it may be inappropriate to describe a substandard variation of a standardized article as an imitation. The word "imitation," as used in the statute, would seem to connote a different commodity to be used in lieu of the food imitated; indeed, Section 403(c) requires the imitation to be of "*another* food" which strongly suggests that a mere inferior brand of the imitated food was not meant to be protected. All ingredients of the seized product are required or may be used in making jam. The seized product looks and tastes like jam and is packaged like jam. Its fundamental difference from standard jam lies in the substitution of a pectin solution—that is, pectin and water—for a substantial part of the fruit, but it remains jam—a cheapened or debased or adulterated jam, and not "another food." A recent discussion of this problem concludes that, in any event, " 'cheapened,' 'debased' foods were to be denied the channels of interstate commerce." After referring to Bred Spred as the specific "target" of Section 403(g), the author states:

> There is nothing to be found in the legislative history nor in provisions of these sections which suggests in the slightest that any food, being an outlaw of commerce by reason of the

fact that it is lacking in its required integrity, may be restored to a lawful state by labeling it "imitation".[40]

G. Where a Standard of Identity Has Been Established, the Proper Method of Marketing an Article Which Does Not Conform to the Standard Is to Request the Administrator to Establish an Additional Standard, Not to Sell in Violation of the Standard Under a Different Name.

The court below was concerned with the effect of its decision as depriving persons of modest means of an inexpensive and wholesome food product. To avoid this result, the court below stated that a substandard jam could be marketed under some other name than jam, such as "syrup and fruit thickened with pectin." (R. 63.) This dictum seems to approve the precise practice involved in the *Bred Spred* cases—and the one thing clear in the history of this statute is that Congress was seeking to overturn those decisions.

We are of the view that the court below suggested the wrong solution to the problem. If a product purports to be jam by reason of its appearance, composition, taste, advertising, or the manner in which it is distributed and consumed, it must conform to the definition and standard of identity fixed for jam and its label must bear the name "Jam" or the synonym "Preserve." Section 403(g) requires this. The standard cannot be

[40] Markel, *The Law on Imitation Food*, 5 Food, Drug and Cosmetic Law Journal 145, 164-7, April 1950, which extensively reviews the authorities with respect to the meaning of "imitation."

evaded by labeling a low-fruit jam as "Bred Spred," "Imitation Jam," or "Syrup and Fruit Thickened with Pectin"; 403(g) contains no escape provision like those in 403(h) for substandard quality and substandard fill of container.

If, because of the reduced price of low-fruit jam or for any other reason, its marketing is thought to be in the public interest, the proper remedy is to apply to the Administrator for an additional definition and standard of identity—one for low-fruit jam. Just as the Administrator could fix standards for cocoa and low-fat cocoa (21 CFR 14.4, 14.5), cream cheese and neufchatel cheese (21 CFR 19.515, 19.520), he could fix standards for jam and low-fruit jam.[41]

Although the Administrator's finding 40 (5 FR 3556, September 5, 1940, *supra*, p. 31) indicated that low-fruit jam thickened with pectin was then regarded as deceptive to the consumer, if the claimant can present reasonable grounds for belief that conditions have so changed that such products would now be advantageous to the public, the Administrator would hold a public hearing (Sec. 701(e)) at which full facts could be brought forth. In determining whether a standard for low-fruit jam would promote honesty and fair dealing in the interest of consumers the Administrator would take into consideration the extent to which the

[41] Claimant has referred to the establishment of standards of identity for these commodities as inconsistent with the position taken by the Administrator as to jam. But the proper method of determining whether jam and so-called "imitation jam" similarly qualify for two standards of identity is in a proceeding to establish an additional standard, not by disregarding the only standard which has been approved.

public would be confused or deceived by low-fruit jam and the claimed advantage to the public in having a cheaper fruit spread on the market.

Neither the claimant nor anyone else has asked the Administrator to establish a standard of identity for low-fruit jam. If such a request were received, the entire problem could be explored and a record made upon the basis of which the matter could be decided by the Administrator. But so long as the standard for jam remains unamended and unsupplemented by one for low-fruit jam, products of the composition of claimant's will remain illegal.

CONCLUSION

For the reasons herein stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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FEBRUARY, 1951.

APPENDIX

FRUIT PRESERVES AND JELLIES; DEFINITIONS AND STANDARDS OF IDENTITY

21 CFR 29.0, pp. 81-84 (1949 ed.)

§ 29.0 *Preserves, jams; identity; label statement of optional ingredients.* (a) The preserves or jams for which definitions and standards of identity are prescribed by this section are the viscous or semi-solid foods each of which is made from a mixture composed of not less than 45 parts by weight (see paragraph (c) of this section) of one of the fruit ingredients specified in paragraph (b) of this section to each 55 parts by weight (see paragraph (c) (1) of this section) of one of the optional saccharine ingredients specified in paragraph (d) of this section. Such mixture may also contain one or more of the following optional ingredients:

(1) Spice.

(2) A vinegar, lemon juice, lime juice, citric acid, lactic acid, malic acid, tartaric acid, or any combination of two or more of these, in a quantity which reasonably compensates for deficiency, if any, of the natural acidity of the fruit ingredient.

(3) Pectin, in a quantity which reasonably compensates for deficiency, of any, of the natural pectin content of the fruit ingredient.

(4) Sodium citrate, sodium potassium tartrate, or any combination of these, in a quantity the proportion of which is not more than 3 ounces avoirdupois to each 100 pounds of the saccharine ingredient used.

(5) Sodium benzoate or benzoic acid or any combination of these, in a quantity reasonably necessary as a preservative.

Such mixture, with or without added water, is concentrated by heat to such point that the soluble solids content of the finished preserve is not less than 68 percent if the fruit ingredient is specified in Group I of paragraph (b) of this section, and not less than 65 percent if the fruit ingredient is specified in Group II of paragraph (b) of this section. The soluble solids content is determined by the method prescribed in "Official and Tentative Methods of Analysis of the Association of Official Agricultural Chemists" Fourth Edition, page 320 [Ed. note, 6th edition, p. 383], under "Soluble Solids in Fresh and Canned Fruits, Jams, Marmalades, and Preserves—Tentative", except that no correction is made for water-insoluble solids.

(b) The fruit ingredients referred to in paragraph (a) of this section are the following mature, properly prepared fruits which are fresh, frozen, and/or canned:

GROUP I

Blackberry (other than dewberry).
Black raspberry.
Blueberry.
Boysenberry.
Cherry.
Crabapple.
Dewberry (other than boysenberry, loganberry, and youngberry).
Elderberry.
Grape.

GROUP I (Continued)

Grapefruit.
Huckleberry.
Loganberry.
Orange.
Pineapple.
Raspberry, red raspberry.
Rhubarb.
Strawberry.
Tangerine.
Tomato.
Yellow tomato.
Youngberry.

Any combination of two, three, four, or five of such fruits in which the weight of each is not less than one-fifth of the weight of the combination; except that the weight of pineapple may be not less than one-tenth of the weight of the combination.

GROUP II

Apricot.
Cranberry.
Damson, damson plum.
Fig.
Gooseberry.
Greengage, greengage plum.
Guava.
Nectarine.
Peach.
Pear.
Plum (other than greengage plum and damson plum).
Quince.
Red currant, currant (other than black currant).

Any combination of two, three, four, or five of such fruits, or one or more of such fruits with one or more of the individual fruits specified in Group I, in which the weight of each is not less than one-fifth of the weight of the combination; except that the weight of pineapple may be not less than one-tenth of the weight of the combination.

Any combination of apple and one, two, three, or four of the individual fruits specified in this group or Group I in which the weight of each is not less than one-fifth, and the weight of apple is not more than one-half, of the weight of the combination; except that the weight of pineapple may be not less than one-tenth of the weight of the combination.

In any combination of two, three, four, or five fruits, each such fruit is an optional ingredient. For the purposes of this section, the word "fruit" includes the vegetables specified in this paragraph.

(c) Any requirement of this section with respect to the weight of any fruit, combination of fruits, or fruit ingredient means:

(1) The weight of fruit exclusive of the weight of any sugar, water, or other substance added for any processing or packing or canning, or otherwise added to such fruit;

(2) In the case of fruit prepared by the removal, in whole or in part, of pits, seeds, skins, cores, or other parts, the weight of such fruit exclusive of the weight of all such substances removed therefrom; and

(3) In the cases of apricots, cherries, grapes, nectarines, peaches, and all varieties of plums, whether or not pits and seeds are removed therefrom, the weight of such fruits exclusive of the weight of such pits and seeds.

(d) The optional saccharine ingredients referred to in paragraph (a) of this section are:

(1) Sugar.

(2) Invert sugar sirup.

(3) Any combination composed of optional saccharine ingredients (1) and (2).

(4) Any combination composed of corn sugar or dextrose and optional saccharine ingredient (1), (2), or (3).

(5) Any combination composed of corn sirup and optional saccharine ingredient (1), (2), (3), or (4), in which the weight of the solids of each component is not less than one-tenth of the weight of the solids of such combination and the weight of corn sirup solids is not more than one-half of the weight of the solids of such combination.

(6) Honey.

(7) Any combination composed of honey and optional saccharine ingredient (1), (2), or (3), in which the weight of the solids of each component except honey is not less than one-tenth of the weight of the solids of such combination and the weight of honey solids is not less than two-fifths of the weight of the solids of such combination.

(e) For the purposes of this section:

(1) The weight of any optional saccharine ingredient means the weight of the solids of such ingredient.

(2) The term "sugar" means refined sugar (sucrose).

(3) The term "invert sugar sirup" means a sirup made by inverting or partly inverting sugar or partly refined sugar; its ash content is not more than 0.3 percent of its solids content, but if it is made from partly refined sugar, color and flavor other than sweetness are removed.

(4) The term "corn sugar" means refined anhydrous or hydrated dextrose made from cornstarch.

(5) The term "dextrose" means refined anhydrous or hydrated dextrose made from any starch.

(f) The name of each preserve or jam for which a definition and standard of identity is prescribed by this section is as follows:

(1) If the fruit ingredient is a single fruit, the name is "Preserve" or "Jam," preceded or followed by the name or synonym whereby such fruit is designated in paragraph (b) of this section.

(2) If the fruit ingredient is a combination of two, three, four, or five fruits, the name is "Preserve" or "Jam," preceded or followed by the words "Mixed Fruit" or by the names or synonyms whereby such fruits are designated in paragraph (b) of this section, in the order of predominance, if any, of the weights of such fruits in the combination.

(g) (1) When optional ingredient (a) (1) is used, the label shall bear the word "Spiced" or the statement "Spice Added" or "With Added Spice"; but in lieu of the word "Spice" in such statements the common name of the spice may be used.

(2) When optional ingredient (a) (5) is used, the label shall bear the words "Sodium Benzoate" or "Benzoic Acid," or "Sodium Benzoate and Benzoic Acid," as the case may be, followed by the words "Added as Preservative."

(3) When optional saccharine ingredient (d) (5) or (d) (7) is present, the label shall bear the names of the components of the combination whereby such components are designated in paragraph (d) of this section, in the order of predominance, if any, of the weights of such components in the combination. Such names shall be preceded by the words "Prepared with".

(4) When optional saccharine ingredient (d) (6) is used, the label shall bear the statement "Prepared with Honey".

(5) When the fruit ingredient is a combination of two, three, four, or five fruits and the preserve is designated on its label by the name "Preserve" or "Jam" preceded or followed by the words "Mixed Fruit", the label shall bear the names or synonyms whereby such fruits are designated in paragraph (b) of this section, in the order of predominance, if any, of the weights of such fruits in the combination.

(6) Wherever the name specified in paragraph (f) of this section appears on the label of the pre-

serve so conspicuously as to be easily seen under customary conditions of purchase, the words and statements specified in this section, showing the optional ingredients used, shall immediately and conspicuously precede or follow such name, without intervening written, printed, or graphic matter, except that the varietal name of the fruit used in preparing such preserve may so intervene.

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